Supreme Court, U.S.
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No. 01-704

IN THE

Supreme Court of the United States

United States of America, et al.,

Petitioners,

v.

Thomas Lamar Bean,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

It is a federal crime for a person previously convicted of a crime punishable by imprisonment for a term exceeding one year to possess a firearm. There are a variety of exceptions, however, including the Secretary of the Treasury's power under 18 U.S.C. 925(c) to grant relief from this disability. The statute grants an express right to judicial review.

The question presented is whether annual appropriations measures barring the Bureau of Alcohol, Tobacco, and Firearms from acting upon applications for relief from federal firearms disabilities also impliedly repeal the right to judicial review conferred by 18 U.S.C. 925(c).

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 253 F.3d 234.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2001. The petition for a writ of certiorari was filed on November 19, 2001, and was granted on January 22, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions appear *infra* at 1a-2a.

STATEMENT

I. Statutory Background

1. It is a federal crime for "any person * * * who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year * * * to * * * possess * * * any firearm * * * shipped or transported in interstate or foreign commerce." 18 U.S.C. 922(g)(1) ("Section 922(g)(1)").[1] Since 1965, however, Congress has cabined the statute's sweeping terms with an express "[e]xception[]" that offers "[r]elief from disabilities." 18 U.S.C. 925 (title). "A person who is prohibited from possessing * * * firearms * * * may make application to the Secretary [of the Treasury] for relief from the disabilities imposed by Federal laws." *Id.* § 925(c) ("Section 925(c)"). The Secretary "may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public

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[1] This section and related provisions apply equally to the possession of "ammunition," as well as to the "receipt" of firearms and ammunition. Respondent uses the terms "firearm" and "possess" for ease of reference.

interest." *Id.* The Secretary has directed that Section 925(c) applications be considered by the Bureau of Alcohol, Tobacco, and Firearms ("ATF") (see 27 C.F.R. 178.144(b)), although he has of course not renounced his personal authority to grant relief.

Administrative action by the Secretary has long been subject to judicial review. Under Section 925(c) as originally enacted, the federal courts held that a relatively narrow form of review was available under the Administrative Procedure Act ("APA"). *Kitchens* v. *Department of Treasury*, 535 F.2d 1197, 1199-1200 (CA9 1976) (holding that review is limited to "an examination of the statement of the reasons upon which the Director made his decision to deny relief"). In 1986, Congress added a special judicial review provision to "improve the ability of the deserving members of the public to obtain relief from the legal disqualification from firearms ownership." H.R. Rep. No. 495, 99th Cong., 2d Sess. 28 (1986). "Any person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court for the district in which he resides for a judicial review of such denial." 18 U.S.C. 925(c). Although APA review is generally limited to "the administrative record already in existence" (*Camp* v. *Pitts*, 411 U.S. 138, 142 (1973)), Congress provided in Section 925(c), by contrast, that "[t]he court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice."

Section 925(c) is only one of four broad exceptions to the criminal sanction of Section 922(g)(1). The others are set forth at 18 U.S.C. 921(a)(20). Congress has exempted an array of white-collar crimes – "any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices." *Id.* § 921(a)(20)(A). Also exempt are virtually all state-law misdemeanors. *Id.* § 921(a)(20)(B). Finally, in 1986, Congress overturned *Dickerson* v. *New Banner Institute*, 460 U.S. 103 (1983), to exempt "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored" under state law unless firearms rights are "expressly" withheld. 18 U.S.C. 921(a)(20). This relief is available through various procedures in most of the country. Many states grant relief specifically by lifting disabilities automatically upon the expiration of an individual's state sentence or by permitting application to a state judge. See *infra* at 15a (cataloging state statutes).[2]

2. In 1992, ATF came under heavy criticism for devoting excessive resources to investigating Section 925(c) petitions and for granting relief too freely. A widely publicized report by *Amicus* Violence Policy Center ("VPC") asserted that, from 1985 to 1991, ATF annually spent between $2.75 and $4.25 million to process Section 925(c) applications. Moreover, ATF granted these applications at a very high rate (approximately one in three), including for some persons who had been convicted of violent felonies. Sample data furthermore suggested that ATF granted relief in some cases (approximately two-and-a-half percent of the granted applications) in which the applicant went on to commit another crime. See generally VPC, *Putting Guns Back into Criminals' Hands: 100 Case Studies of Felons Granted Relief from Disability Under Federal Firearms Laws* (March 1992). Substantial pressure developed to terminate the ATF program. *E.g.*, Editorial: *Felon Gun Program Should Be Disbanded*, CHI. SUN-TIMES, July 1, 1992, at 31 ("It is outrageous in the extreme for the federal government to shell out millions of dollars helping convicted felons to get their hands on guns - legally! - under a program that offers 'relief' to felons with the 'disability' of being unable to own weapons."); *Morning Edition: BATF Felon Gun Program A Campaign Issue?* (NPR radio broadcast, July 30, 1992) (reporting ATF Director was "embarrassed by the fact that his bureaucrats have to spend $4 million of taxpayer's money every year to determine which felons should be allowed to carry guns and which should not").

Congress responded in a targeted fashion to this criticism that the costs of the ATF administrative relief program were not worth the benefits received. It did not eliminate any of the four

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[2] For a complete list of state statutes restoring civil rights to felons as of 1993, see Pet. Br. App., No. 93-445, *Beecham* v. *United States*.

exceptions to federal firearms disabilities or modify or repeal any of the rights and powers conferred by Section 925(c), such as individuals' right to submit requests for relief, the Secretary's personal authority to grant relief, or the right to judicial review. Although Congress considered a number of such measures, it opted against those changes. See *infra* at 23-25 (discussing proposals), 8a-14a (reproducing proposals). Instead, Congress reallocated the restoration program's budget to a different program designed to combat violent crime – specifically, it shifted the funds to the Armed Career Criminal Apprehension Program ("ACCAP") – and prohibited the ATF from using other funds to grant applications for relief. See generally S. Rep. No. 353, 102d Cong., 2d Sess. 20 (1992) (summarizing 1993 ACCAP appropriations, including 40 full-time equivalent employees and $3.75 million redirected from firearms disability relief operations).[3] In that year and subsequently, Congress included a "proviso" to ATF's budget (as opposed to the budget of the Department of the Treasury generally): "none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c)." Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732, Unnumbered Section: "Bureau of Alcohol, Tobacco and Firearms – Salaries and Expenses."[4]

There is very little legislative history regarding these appropriations. Neither the full House nor the full Senate has ever expressed its views; the relevant congressional reports are limited to statements by the respective Appropriations Committees. Nor does any report contain even the briefest discussion of Section 925(c)'s judicial review provision. The reports for some of

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[3] This reallocation of funds was necessary to meet the Fiscal Year 1993 appropriation measure's requirement that "no fewer than 1440 full-time equivalent positions * * * be allocated for the [ACCAP]." 106 Stat. 1732.

[4] Subsequent ATF appropriations have exempted corporate applications from the funding prohibition, see, *e.g.*, 107 Stat. 1228, although very few such applications are ever filed.

the appropriations measures – although notably not the Fiscal Year ("F.Y.") 1999 appropriation at issue in this case – briefly mention the withholding of funds. These passages indicate that the respective Appropriations Committees concluded that the benefits provided by the ATF program were insufficient to justify such large expenditures of funds, in part because ATF had restored firearms rights too freely, and should therefore be spent on a more worthy program. *E.g.*, S. Rep. No. 353, *supra*, at 19-20; H.R. Rep. No. 618, 102d Cong., 2d Sess. 13-14 (1992); see *infra* at 43-44 (quoting both reports), 3a-7a (reproducing all relevant excerpts from every annual report). As the United States advised this Court at the time the appropriations bar was initiated, quoting the 1992 House Report's statement that these funds "would be better utilized * * * in fighting violent crime," the annual appropriations reflect "Congress's choice not to fund firearms rights restoration procedures *during times of fiscal restraint*." Br. for the U.S., No. 93-445, *Beecham* v. *United States* 25 n.14 (emphasis added). Contra Pet. Br. 13, 21-23.

II. Factual Background and Procedural History

1. Respondent Thomas Bean's unimpeachable character, including his suitability to possess firearms, is established by the record and is not disputed by any party to this case. As subsequently found by the district court as a matter of fact (Pet. App. 34a-36a; see also J.A. 16-26 (written submissions), 52-60 (trial testimony)), respondent is a long-time resident of Orange County, Texas and a businessman in Port Arthur, Texas. He and his wife of forty years have two adult children. He "has never been charged with or convicted of a crime in the United States, except for minor traffic offenses." Pet. App. 34a. As confirmed by the sworn testimony of the local Chief of Police and Deputy Sheriff, both of whom have long been personally familiar with respondent's character, he indisputably is a person of "trustworthiness and good character" with a "reputation for being a law abiding citizen of the community." *Id.* 35a.

Particularly relevant to the relief that respondent seeks, he was, at the time of the events giving rise to this case, a licensed firearms dealer. ATF issues such a license, and continues it in

force, only if the licensee has complied with all federal firearms laws and has accurately maintained detailed records. See generally 18 U.S.C. 923; 27 C.F.R. 178.42-.91. The sworn trial testimony of the ATF inspector established that respondent was "a cooperative licensee" who maintained "excellent records." Pet. App. 35a. The local Chief of Police testified that respondent was "a cautious licensed firearms dealer." *Id.* "[H]e was very methodical; and if he had any suspicion or any doubt or anything that would indicate that something might not be quite right, he just simpl[y] wouldn't sell. He would not trade, he just wouldn't do it." J.A. 53-54.

2. On March 14, 1998, respondent attended a gun show in Laredo, Texas with three assistants. That evening, they planned to travel across the nearby Mexican border for dinner. Before doing so, they returned to their hotel and, in an abundance of caution, respondent "instructed his assistants to remove all firearms and ammunition from" his vehicle (Pet. App. 13a), so as not to "take anything across the border" (J.A. 40). The assistants, however, "inadvertently left approximately two hundred rounds of ammunition in plain view in the back" of the vehicle, where it was immediately seen by Mexican border officials. Pet. App. 13a. Although everyone in the vehicle was initially arrested, Mexican officials ultimately detained only respondent, whom they charged as the owner of the vehicle and the ammunition with the felony of introducing ammunition into the Republic of Mexico. *Id.* It is undisputed that respondent was unaware not only that "the ammunition was in the vehicle at the time he crossed the border," but also that "possession of ammunition was an offense in the Republic of Mexico." *Id.*

"Knowing that [respondent] could not read, speak, or understand the Spanish language," Mexican officials required him to sign a document in Spanish that he only later learned "amounted to a confession." Pet. App. 31a-32a. As a result, and without a trial, respondent was "convicted and sentenced to a term of imprisonment of five years in Mexico." *Id.* 32a.[5] He remained

[5] Mexico reacted to the outcry over these events by recategorizing the crime of introducing firearms or ammunition into that country as a misdemeanor for first-time offenders, although the change does not apply retroactively to respondent's case. Pet. App. 2a n.1.

incarcerated in a Mexican prison for four months until he was transferred to a U.S. penitentiary pursuant to an international treaty. *Id.* 13a. Within a month, Judge Fisher of the United States District Court for the Eastern District of Texas concluded based on a review of the record that respondent should be placed on supervised release. Ten months later, the court eliminated even those restrictions. *Id.* 13a-14a.

3. Pursuant to Section 925(c), respondent filed an application with the Secretary of the Treasury for permission to possess firearms and to regain his license as a firearms dealer. J.A. 27-32. As required by the applicable regulation (27 C.F.R. 178.144), the application detailed respondent's personal history (J.A. 27-28, 30-31) and the circumstances of his conviction (*id.* 28-29). Respondent also attached letters from two local Chiefs of Police, the local Sheriff, a local City Marshal, and a State Judge, each attesting to respondent's good character and suitability to possess firearms. *Id.* 16-26, 31. ATF, however, did not grant respondent the relief he requested. By letter, ATF advised respondent that, although federal law "provides the Secretary of the Treasury with the authority to grant relief from this disability," "[s]ince October 1992, ATF's annual appropriation has prohibited the expending of any funds to investigate or act upon applications for relief." *Id.* 33. The restriction governing respondent's application, the letter explained, "is located in Pub. L. No. 105-277, 112 Stat. 2681, containing ATF appropriations for fiscal year 1999." *Id.* 34. Based on this restriction, ATF "return[ed] [respondent's] application for restoration of Federal firearms privileges and the supporting documentation." *Id.*

4. Respondent then sought judicial review pursuant to Section 925(c). J.A. 8-15. The petition was assigned to Judge Fisher, who was familiar with the details of respondent's record and the circumstances of the Mexican conviction because he had overseen the imposition and then termination of respondent's supervised release. The parties briefed the government's motion to dismiss the petition for lack of jurisdiction, which asserted

that Congress had impliedly repealed Section 925(c) by restricting ATF's appropriations. The district court also held a hearing devoted to the legal and factual issues surrounding whether respondent's firearms privileges should be restored. *Id.* 38-60 (transcript excerpts). The government did not challenge the accuracy of respondent's proof. Nor, of particular note, did the government contend that the proof was insufficient to justify the district court's granting respondent relief from firearms disabilities under Section 925(c), suggest a need for a further investigation into respondent's background, or request that the matter be remanded to the Secretary.

In a detailed opinion, the district court concluded that it had jurisdiction to consider respondent's petition and determined that the petition should be granted under the plain terms of Section 925(c). Pet. App. 12a-38a. In response to the government's reliance on a supposed implied repeal of the statute's judicial review provision, the district court followed this Court's repeated holdings that "repeals by implication are 'strongly' disfavored" and that Congress's intent to do so through "an appropriation act" "must be clearly stated." *Id.* 17a (quoting *Johnson* v. *Robison*, 415 U.S. 361, 373-74 (1974), and citing *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992)). Nothing in the text of the appropriations statutes even obliquely suggests an intent to repeal the right to judicial review. Moreover, having "diligently searched the legislative history of both 18 U.S.C. § 925(c) and the Appropriations Acts," the district court found only "contradictory statements." *Id.* 20a. This is "a textbook case on why the courts should be hesitant to use legislative history to suspend any substantive right which is expressly available in statutes." *Id.* 27a. Not only does it depend on "whose side you represent as to which committee report you choose to employ and which committee report you choose to ignore," but committee reports lack authoritative force. *Id.* (citing *Pierce* v. *Underwood*, 487 U.S. 552, 567-68 (1988); *Wis. Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 621 (1991) (Scalia, J., concurring)). In any event, the district court concluded that the legislative history, when read fairly, reveals that "Congress was concerned with the ATF's inefficient and wasteful administrative review

process rather than a desire to curb the availability of relief itself" (*id.* 24a) and thus, as the appropriations measures state on their face, Congress "only intended the suspension of the ATF's ability to investigate or act upon applications for relief by individuals" (*id.* 26a). "If Congress 'intended' to change anything, it deleted administrative action from the statute, but otherwise left judicial relief available." *Id.* 24a.

The government's argument for an "implied repeal," the district court continued, was also "inconsistent with the totality of the statutory scheme." Pet. App. 25a. The relief provision has been an integral component of federal firearms law since 1965. Congress has repeatedly amended Section 925(c) without eliminating applicants' rights to request relief and to seek judicial review; to the contrary, "each time" Congress has modified the statute, it has done so "with a concern toward those persons who possess guns in a lawful manner but are denied possession of firearms because of unrelated felony convictions." *Id.* 24a. The legislative history of these amendments demonstrates Congress's determinations that "not all persons convicted of felonies should be denied firearms privileges forever" and that "the judiciary [should] give the final word on the appropriateness of a denial" of relief under Section 925(c). *Id.* 22a. Particularly significant, the government's position "ignores" Section 921(a)(20), which permits individuals to "obtain restoration of [their] federal firearm rights by operation of *state* law and without the involvement of *any* special ATF competency" (*id.* 24a-25a (citing *Caron* v. *United States*, 524 U.S. 308 (1998); *Beecham* v. *United States*, 511 U.S. 368, 371 (1994)) (emphases added)), such as through "'a general law stating that all rights shall be reinstated upon the service of a sentence'" or by authorizing officials to issue "certificates of restoration" (*id.* 25a (quoting *McGrath* v. *United States*, 60 F.3d 1005, 1008 (CA2 1995), *cert. denied*, 516 U.S. 1121 (1996))). Therefore, even setting aside the express delegation of authority by Congress to the Secretary of the Treasury himself to grant relief personally under Section 925(c), Congress plainly does not regard ATF as "solely and specially capable" of making the determination whether firearms rights should be restored. *Id.*

Nor did Congress repeal applicants' right to judicial review through the appropriations acts. Neither the text nor the legislative history suggests such an intent. To the contrary, ATF's failure to grant respondent relief "constitutes a de facto denial of an application such that a United States district court may consider a petition for judicial review of the denial." Pet. App. 30a. Section 925(c) merely requires applicants to exhaust their administrative remedies, a requirement that is satisfied at the point that it "would be wholly futile or inadequate" to continue to pursue administrative action. *Id.* Nor could Congress have intended to "rigidly" require administrative exhaustion, given that "it gave the district courts discretion to create or supplement the administrative record when necessary to avoid a miscarriage of justice." *Id.*

The courts, moreover, are fully equipped to exercise the jurisdiction that Congress conferred in Section 925(c). Not only does the statute ultimately call for an "adjudicative" determination (Pet. App. 28a), but "part of the day-to-day role of the court is to make character determinations of the individuals before it" (*id.* 29a). Importantly, the courts' role in exercising judicial review under Section 925(c) can be tailored to the "concerns expressed by Congress" in the appropriations acts. *Id.* 28a. In a judicial proceeding, "the burden would be on the applicant" to present sufficient evidence regarding matters such as his "record, reputation, and the underlying reason for the disability"; if the applicant failed "to secure *all* the necessary evidence," relief would simply be denied. *Id.* (emphasis added). In making this determination, the district court would have access to information on "how the ATF had conducted its investigations in the past." *Id.* 29a. Among other things, this process "shift[s] the financial burden from the government to the applicant" (*id.* 28a), including paying the cost of any "investigative work [that] needs to be done" (*id.* 29a).

On the substance of the petition, the district court found it incontestable – and indeed *uncontested* – that respondent was entitled to relief from firearms disabilities. The court summarized the testimony of the several live witnesses – including an ATF inspector and local police officials – regarding respondent's established and consistent record as a law-abiding citizen, person of unimpeachable character, and respected firearms dealer. Pet. App. 34a-36a; see also *supra* at 5-6. The undisputed testimony at trial notably included the local Sheriff's assurance to the court that "if there were any complaints against [respondent] or his name was brought up in any type of criminal activity, I would know it." J.A. 54. The court also recounted the *ten* separate letters of recommendation attesting to respondent's "good moral character, integrity, and reputation," which included letters from four police officials, a state district judge, a state district attorney, and a pastor. Pet. App. 36a. The Sheriff, for example, confirmed that his confidence in respondent's suitability to possess firearms rested on his personal knowledge and his personal review of respondent's criminal history records "locally, as well as nationally." J.A. 18. Based on the foregoing, the district court found that "the circumstances regarding the disability imposed by law and [respondent's] record and reputation are such that [respondent] will not be likely to act in a manner dangerous to public safety and that the granting of the relief requested would not be contrary to the public interest." Pet. App. 37a.

5. On the government's appeal, the Fifth Circuit affirmed (Pet. App. 1a-11a), concluding that "[t]he facts of this case illustrate in caps underscored why Congress added the relief provision to the Federal Firearms Act, giving certain convicted felons an avenue to regain the right to possess a firearm" (*id.* 1a).

In addition to the reasons set out in the district court's "detailed Memorandum Opinion" (Pet. App. 3a), the Fifth Circuit found it significant that this Court's precedents not only hold "that the doctrine disfavoring repeals by implication 'applies with ever *greater* force when the claimed repeal rests solely on an Appropriations Act'" (*id.* 7a (quoting *TVA* v. *Hill*, 437 U.S. 153, 190 (1978) (original emphasis in *TVA*)), but also have found appropriations law to impliedly repeal *only* "purely financial right[s] that Congress refused to fund" (*id.* 7a-8a & n.19 (citing *United States* v. *Will*, 449 U.S. 200 (1980) (salaries); *United States* v. *Dickerson*, 310 U.S. 554 (1940) (military reenlistment payments)). This case, by contrast, involves not an

assertion of Congress "merely promising money then changing its mind and not making it available," but rather the claimed suspension of a distinct and established right to judicial review separately conferred by positive law. *Id.* 8a. It would be "inimical to our constitutional system of justice," the Fifth Circuit explained, to find that Congress had abrogated the "rights" set forth in Section 925(c) absent a "direct and definite suspension." *Id.* 8a, 9a. And any suggestion that Congress implicitly intended to repeal those rights is substantially clouded by its decision not to enact a statute that would have done just that. *Id.* 5a-6a & n.9, 8a.

The court of appeals also found it clear that the district court had properly granted respondent relief under Section 925(c). Congress specifically conferred a right to judicial review "to better ensure that relief was available for those felons whose convictions were based on technical or unintentional violations." Pet. App. 4a-5a. This case involves "the almost incredible plight of Thomas Bean who, at most, was negligent in not ensuring that his associates completely performed the simple task directed, and who served months in Mexican and U.S. prisons for a simple oversight." *Id.* 11a. Furthermore, "the record is replete with testimony from legislators, law enforcement officers and BATF agents as to Bean's lawful character." *Id.* 5a-6a n.9. In light of the extensive record, the Fifth Circuit did "not believe that *any reasonable observer*" could be "persuaded that [respondent's] offense creates a likelihood he represents a threat to the public's well-being, and it is beyond peradventure to believe that Congress, or those seeking to rescind § 925(c), intended for someone like Bean to lose his livelihood on the basis of the facts such as are before us. Neither equity nor the law require such an injustice." *Id.* 11a (emphasis added).[6]

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[6] Although the Fifth Circuit properly rejected the government's contentions (raised for the first time on appeal) that respondent was not entitled to relief because he was at the time disabled by Texas law from possessing firearms and because fewer than two years had passed since he was discharged from supervised release (Pet. App. 9a-11a & n.24), it bears noting that neither of those objections has force. State courts have entered a declaration that respondent "is not a convicted felon as that term is defined under Texas law." Order of Feb. 25, 2000, No. D-990, 424-C (Orange Cty., TX, 260th Jud. Dist.); BIO 6. In addition, the two-year period has passed. See Pet. C.A. Br. 16 (acknowledging that the period ended in "August 2001"). See generally BIO 8-13 (highlighting importance to posture of this case that petitioners do not contest respondent's suitability to possess firearms).

6. The full court of appeals denied petitioners' request for rehearing *en banc* without a single judge calling for a vote. Pet. App. 39a-40a.

7. This Court subsequently granted the Solicitor General's petition for certiorari, which identified a circuit conflict over the federal courts' jurisdiction to consider petitions under Section 925(c). 122 S. Ct. 917 (2002).

SUMMARY OF ARGUMENT

I. Petitioners' claim that the right to judicial review which Congress conferred in Section 925(c) has been impliedly repealed through ATF's appropriations must rest on an unambiguous statement by Congress in the statutory text. As the lower courts recognized but petitioners all but ignore, not only will an implied repeal be found only "when the earlier and later statutes are irreconcilable" (*Morton* v. *Mancari*, 417 U.S. 535, 550 (1974)), but that rule "applies with *especial force* when the provision advanced as the repealing measure was enacted in an appropriations bill" (*United States* v. *Will*, 449 U.S. 200, 221-22 (1980) (emphasis in original)). In this case, three further canons of construction heighten that exceedingly stringent standard: the principle that courts must exercise the jurisdiction conferred upon them by Congress; the Rule of Lenity; and the doctrine of constitutional avoidance, which applies with considerable force because petitioners' argument calls the constitutionality of Section 922(g)(1) into question under the Second Amendment. Finally, this is the least likely context in which to find an implied repeal, because Congress closely superintends federal firearms law. Cf. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). Of particular note, the House and the Senate have

each considered but declined to adopt *four* proposals to effect the repeal that petitioners urge in this case.

II. Petitioners cannot establish an implied repeal because the lower courts properly harmonized Section 925(c) and ATF's appropriations. The standard articulated below is both eminently practicable and faithful to the statutory text. Only the most extraordinary applicant will survive the rigorous "threshold" inquiry into whether relief is required to avoid a "miscarriage of justice." The applicant then bears the full cost of any investigation necessary to give the district court full confidence that the applicant satisfies all the statutory criteria for relief from firearms disabilities. And relief will ultimately be granted only if the district court finds that "any reasonable observer" would conclude that the applicant is entitled to relief from firearms disabilities. It is undisputed that petitioner satisfies this extremely stringent standard.

III. The three arguments advanced by petitioners manifestly do not constitute the clear and compelling evidence this Court's precedents require to demonstrate a congressional intent to impliedly repeal a statutory right.

A. Petitioners' reliance on the term "denial" to establish an implied repeal is misplaced. This argument, like petitioners' brief generally, proceeds from the false premise that Congress prohibited the Secretary of the Treasury from acting on firearms applications, when in fact the appropriations provisos apply only *to ATF*. The appropriations statutes thus do not purport to prohibit the Secretary from acting on Section 925(c) applications.

In any event, petitioners' position is irreconcilable with the plain meaning of "denial": by refusing to act on respondent's application, the Secretary has "'refus[ed] to grant, assent to, or sanction'" the relief respondent seeks. An array of precedent establishes the commonsense proposition that a refusal to act is, at the least, a constructive "denial" of relief. And petitioners' position cannot be reconciled with either Section 925(c) – which recognizes only two forms of "final action," relief may be "grant[ed]" or "denied" – or the governing regulation.

B. Petitioners' reliance on the legislative history of the appropriations statutes is no more compelling. Petitioners ignore this Court's repeated holding that legislative history is ineffective to establish an implied repeal of a statutory provision. That rule has particular force in this case. There is *no* relevant legislative history for ATF's F.Y. 1999 appropriation. Petitioners also cite only appropriations committee reports, which this Court held in *TVA* v. *Hill*, 437 U.S. 153 (1978), are not representative of the views of the full House or Senate and thus cannot establish an implied repeal. In any event, the legislative history suggests only that Congress made a cost-benefit determination that ATF's large expenditures in reviewing Section 925(c) applications were better spent on another program, in part because ATF was granting relief too freely. The lower courts in this case accommodated both those concerns while giving effect to the right to judicial review expressly conferred by Section 925(c). Petitioners' position furthermore lacks credibility because, at two important points, it relies on legislative history describing measures that Congress did not pass.

C. Petitioners' reliance on the Administrative Procedure Act also fails. The APA does not apply to the distinct right to judicial review that Congress conferred in Section 925(c). To the extent the courts have inferred the APA's applicability, it is that inference, not the right to judicial review, that gives way to any conflict with ATF's appropriations. In any event, respondent is entitled to relief under the APA. The Secretary's refusal to grant respondent the relief from firearms disabilities to which he is entitled under the standards set by Section 925(c) is "unlawful," "short of statutory right," and "unwarranted by the facts." 5 U.S.C. 706. Furthermore, both the statutory text and precedent establish that the district court was not required to remand respondent's application to the Secretary (relief that petitioners did not seek in any event).

The judgment of the court of appeals accordingly should be affirmed.

ARGUMENT

I. Petitioners' Claim That Section 925(c) Has Been Impliedly Repealed Can Only Be Sustained Based on an Unambiguous Statement by Congress in the Statutory Text.

1. Petitioners contend that Congress deprived the federal courts of jurisdiction over this case by impliedly repealing 18 U.S.C. 925(c) as it applies to individuals. The statute provides that any "person" – defined to include "any individual" (18 U.S.C. 921(a)(1)) – may apply for relief from firearms disabilities. *Id.* § 925(c). Congress authorized the Secretary, in turn, to "grant such relief" so long as certain criteria are met. *Id.* And individuals may subsequently secure "judicial review" wherein the court may "admit additional evidence where failure to do so would result in a miscarriage of justice." *Id.* Congress has not repealed these provisions. Nor has the Secretary repealed or otherwise amended the governing regulation (27 C.F.R. 178.144) to reflect what petitioners now contend has been Congress's unambiguous intent for the past decade. The court of appeals accordingly held that these unambiguous statements of positive law must be given force and effect. See Pet. App. 8a-9a; *supra* at 11-12.

Petitioners rest their contrary position not on any provision of federal firearms law, nor on any other statutory restriction on the authority of the Secretary or the jurisdiction of the federal courts, but rather on the federal appropriations statutes governing ATF's expenditures of funds. Since F.Y. 1993, Congress has annually appended the following "proviso" to ATF's budget: "none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities." Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732, Unnumbered Section: "Bureau of Alcohol, Tobacco and Firearms – Salaries and Expenses." See *infra* at 1a-2a (collecting appropriations statutes). According to petitioners, the "appropriations bar has the effect of suspending the Secretary's authority under Section 925(c)" (Pet. Br. 11) and

furthermore "effectively precludes a court from awarding a convicted felon relief" (*id.* 17 (title)).

2. Petitioners only glancingly acknowledge the exceedingly high bar their "implied repeal" claim must overcome. Our Constitution's system of separated and divided powers requires the courts to interpret and the Executive to enforce the statutes Congress writes and duly enacts into law. See U.S. Const. art. I, § 2; *id.* art. II, § 3; *id.* art. III, § 2. Given the singular importance of positive law in our constitutional system, this Court has found a "repeal by implication" of a statute on the books only in the face of "overwhelming evidence." *J.E.M. AG Supply* v. *Pioneer Hi-Bred Int'l*, 122 S. Ct. 593, 601 (2001). One statute repeals another by implication only "when the earlier and later statutes are *irreconcilable*." *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974) (emphasis added). Few rules of statutory construction have such a settled provenance in this Court's jurisprudence. "It would be dangerous in the extreme to infer * * * that a case for which the words of an instrument expressly provide, shall be exempted from its operation." *Sturges* v. *Crowninshield*, 17 U.S. (4 Wheat.) 122, 202 (1819). Adherence to these basic principles is absolutely essential when, as in this case, the Executive seeks to abrogate the jurisdiction that Congress has conferred on the courts in order to avoid enforcing a statute that it disfavors.

The already stringent standard for finding an implied repeal "applies with *especial force* when the provision advanced as the repealing measure was enacted in an appropriations bill." *United States* v. *Will*, 449 U.S. 200, 221-22 (1980) (emphasis in original) (citing *TVA* v. *Hill*, 437 U.S. 153, 190 (1978)). This ratcheting up of the bar respects not merely the roles assigned to the respective branches of government by the Constitution, but also Congress's own procedures and ordinary practice. Unlike single-purpose statutes that unambiguously repeal ongoing statutory rights, appropriations are revisited every year and are the amalgamated product of thousands of necessarily zero-sum compromises reached in the sausage factory that is federal budgeting. For their part, legislators and even the President, who has the vital prerogative to sign or veto legislation, must be able to act on the understanding that appropriations measures will, in

fact, address *appropriations*, not fundamentally alter the operation of separate statutory schemes. Indeed, the House and Senate Appropriations Committees lack jurisdiction to consider and determine matters of substantive law. See *TVA*, 437 U.S. at 191. The rules of both chambers, in turn, affirmatively forbid the use of budget measures to change law not related to appropriations. *E.g.*, House R. 21(2)(b) ("A provision changing existing law may not be reported in a general appropriation bill * * * except rescissions of appropriations contained in appropriation Acts."); see also Senate R. 16(2); *Will*, 449 U.S. at 222. This Court's decisions consistently respect this limitation, finding an implied repeal by appropriations law *only* in the context of salary increases and other similar "purely financial right[s] that Congress refused to fund." Pet. App. 7a-8a & n.19 (collecting cases).[7]

Petitioners ask this Court to find an implied repeal by appropriations law in circumstances never contemplated, much less approved, by this Court's precedents. To be sure, "Congress has *authority* under the Constitution to suspend or repeal substantive law through the enactment of an appropriations law." Pet. Br. 11 (emphasis added). But as a matter of *statutory construction*, this Court has never suggested that Congress's decision to reallocate the funding for a federal program – here, ATF's administrative relief program – could be interpreted to repeal a distinct statutory right. To the contrary, a strong negative inference arises as a result: an implied repeal will not be found when

[7] Thus, *United States* v. *Will*, *supra*, and each of the cases it cited (449 U.S. at 222 & n.23) – *United States* v. *Dickerson*, 310 U.S. 554 (1940), *Belknap* v. *United States*, 150 U.S. 588, 594 (1893), and *United States* v. *Mitchell*, 109 U.S. 146, 150 (1883) – involved Congress's use of an appropriations statute to repeal a previously enacted right to compensation. Petitioners' contrary reliance on *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992), is misplaced. Although *Robertson* held that "a provision in an appropriations law effectively amended a federal environmental statute" (Pet. Br. 24), the appropriations statute in that case did so *expressly*, not impliedly. See 503 U.S. at 440 (Because the appropriations statute "provided *by its terms* that compliance with certain new law constituted compliance with certain old law, the intent to modify was not only clear, but express.").

Congress "nowhere addresses" the supposedly repealed provision. *Regional Rail Reorg'n Act Cases*, 419 U.S. 102, 129 (1974). Rather, "the general rule that repeals by implication are disfavored is *especially* strong" when Congress has acted to repeal one provision but not another because, "if Congress had meant to repeal any part of any other previous statute, it could easily have done so." *Hagen* v. *Utah*, 510 U.S. 399, 416 (1994) (emphasis added). Accord *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1018-19 (1984) (Congress's failure to address in FIFRA Claims Court's jurisdiction over Fifth Amendment takings claims under Tucker Act may have reflected view that no taking occurred or that jurisdiction was available; such ambiguity "cannot be construed to reflect an unambiguous intention to withdraw" jurisdiction). Congress is perfectly capable of fully suspending a particular program through appropriations measures.[8] Accepting petitioners' position could cause unforeseeable damage to the operation of numerous statutory schemes, for Congress often renders specific programs inoperative by withholding funding. A decision by this Court that such restrictions simultaneously operate to repeal distinct but related substantive rights would open the doors to numerous findings, contrary to Congress's intent, that provisions of positive law have been repealed or suspended.

3. If it were possible to imagine a more stringent standard than that already required to find an implied repeal by appropriations law, it would apply in this case, for petitioners' position is substantially disfavored under *three* further settled canons of

[8] Indeed, the provisos to ATF's appropriations are conspicuously narrower than those Congress uses in other instances. Compare, *e.g.*, Act of Nov. 28, 2001, Pub. L. No. 107-76, § 721, 115 Stat. 704 ("[N]one of the funds appropriated or otherwise made available by this or any other Act may be used to pay the salaries and expenses of personnel to carry out section 793 of Public Law 104-127."); Department of Defense Appropriations Act, 2002, Pub. L. No. 107-117, § 1107, 115 Stat. 2230 ("[N]one of the funds in this Act, or any other Appropriations Act for fiscal year 2002, shall be available for the position of Under Secretary of Transportation for Policy or the position of Assistant Secretary for Public Affairs.").

construction. *First*, Section 925(c) on its face grants individuals a right of "judicial review," and the "federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress" (*Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (collecting cases)). See *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("[Federal courts] have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the [C]onstitution."); cf. *Examining Bd. of Eng'rs* v. *de Otero*, 426 U.S. 572, 594-95 (1976) (rejecting claim that compact granting Puerto Rico commonwealth status impliedly repealed jurisdiction of Federal District Court of Puerto Rico to enforce 42 U.S.C. 1983 "[i]n the absence of a change in the language of the jurisdictional provision or of affirmative evidence in the legislative history"). A holding that this font of jurisdiction was impliedly repealed on less than the strongest possible showing would be "inimical to our constitutional system of justice." Pet. App. 8a.

Second, the right to judicial review granted by Section 925(c) is integral to the scope of the criminal sanction of Section 922(g)(1). Section 925(c) provides an express "[e]xception[]" (18 U.S.C. 925 (title)) that serves the important purpose of "alleviat[ing]" the "potential harshness" of Section 922(g)'s otherwise broad prohibition (*Dickerson* v. *New Banner Inst.*, 460 U.S. 103, 120 (1983)). The relief provided by Section 925(c) is particularly critical because a defendant may not collaterally attack the constitutionality of his felony conviction in defending a charge of unlawful firearms possession, a conclusion this Court reached only after determining that "a convicted felon is not without relief" in light of the orderly scheme established by Section 925(c), under which an applicant would "clear his status *before* obtaining a firearm." *Lewis* v. *United States*, 445 U.S. 55, 64 (1980) (emphasis in original). Under the Rule of Lenity, "doubts are resolved in favor of the defendant" at least when "Congress has not 'plainly and unmistakably'" dictated a contrary result. *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (narrowly construing prohibition as it applies to possession of

firearms "in commerce or affecting commerce") (quoting *United States* v. *Gradwell*, 243 U.S. 476, 485 (1917)).

Third, statutes should be "construed so as to avoid difficult constitutional questions" (*Vt. Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 787 (2000)), such that this Court will "not lightly assume that Congress intended to infringe constitutionally protected liberties" (*Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Coun.*, 485 U.S. 568, 575 (1988) (collecting cases)). This principle has particular force in the context of claimed repeals of jurisdictional provisions by appropriations law. Thus, in the *Regional Rail Reorganization Act Cases*, 419 U.S. at 134, the Court explained that its conclusion that a railroad reorganization statute did not impliedly repeal the jurisdiction of the Claims Court to adjudicate asserted violations of the Takings Clause under the Tucker Act was animated by the principle that "when a statute is ambiguous, 'construction should go in the direction of constitutional policy'" (quoting *United States* v. *Johnson*, 323 U.S. 273, 276 (1944)). More recently, in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), the Court held that a 1996 immigration statute did not partially repeal the jurisdiction conferred by the federal habeas statutes. The Court reasoned that such an argument would have to overcome the presumption against implied repeals (*id.* at 299 n.11), as well as "the strong presumption in favor of judicial review of administrative action" (*id.* at 298 & n.9 (collecting cases)), and furthermore would raise a substantial question under the Constitution's Suspension Clause (*id.* at 300 n.13). "The necessity of resolving such a serious and difficult constitutional issue – and the desirability of avoiding that necessity – simply reinforce the reasons for requiring a clear and unambiguous statement of constitutional intent." *Id.* at 305. And in *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981), the Court rejected the argument that the Unemployment Compensation Amendments of 1976 impliedly repealed the statutory exemption for church-related schools from unemployment taxes. The Court explained that the "long-established canon of construction" disfavoring implied repeals "carries *special weight* when an implied repeal or amendment might raise constitutional

questions." *Id.* at 788 (citing *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979)) (emphasis added).

Petitioners' reading of federal firearms law violates this important canon of construction because they ask this Court to presume that Congress intended to raise a substantial question regarding the constitutionality of Section 922(g)(1) under the Second Amendment to the Constitution. See generally *United States* v. *Emerson*, 270 F.3d 203, 261 (CA5 2001) ("[T]he Second Amendment *does* protect individual rights," and those rights may be limited only subject to "narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country."), *cert. denied*, 2002 U.S. LEXIS 4269 (June 10, 2002); Br. for the U.S., No. 01-8780, *Emerson* v. *United States* 19-20 n.3. On petitioners' view, the categorical criminal sanction of Section 922(g)(1) offers absolutely no opportunity for either the executive branch or the courts to assess whether there is any reasonable basis for depriving any particular individual of the right to keep and bear arms.

4. There is yet another reason why this Court should be dubious of petitioners' position. This case, more than any other in which the Court has been asked to find an implied repeal, involves a statutory scheme carefully superintended by Congress. Cf. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). Section 925(c) is an integral component of "a carefully constructed package of gun control legislation. * * * 'Congress knew the significance and meaning of the language it employed.'" *New Banner Inst.*, 460 U.S. at 120 (alteration in original) (quoting *Scarborough* v. *United States*, 431 U.S. 563, 570 (1977) (quoting, in turn, *Barrett* v. *United States*, 423 U.S. 212, 217 (1976))). Given the committed interests on all sides, it is a simple fact in this country that substantial changes to firearms laws are not made either obliquely or lightly. Accordingly, claims in this forum that such important statutory provisions have been altered by indirection very likely represent attempts to secure victories in court that could not be won in the legislative body.

Since 1990, Congress has amended Section 925 three times while failing to adopt numerous other proposals.[9] Particularly relevant to the question presented by this case, the Senate and House have *each* considered but not adopted *four* separate measures that would have eliminated the administrative and judicial remedies provided by Section 925(c). See *infra* at 8a-14a (reproducing S. 2338, 106th Cong., 2d Sess. § 301(a)(1) (2000); H.R. 4066, 106th Cong., 2d Sess. § 301(a)(1) (2000); H.R. 2281, 106th Cong., 1st Sess. § 2(a)(1) (1999); H.R. 1228, 105th Cong., 1st Sess. § 2(a)(1) (1997); S. 1068, 104th Cong., 1st Sess. § 2(a)(1) (1995); H.R. 2101, 104th Cong., 1st Sess. § 2(a)(1) (1995); S. 1400, 103d Cong., 1st Sess. § 3(a) (1993); S. 2304, 102d Cong., 2d Sess. § 3(a) (1992)). For example, several proposals would have permitted only corporations, not individuals, to file applications and to seek judicial review. *E.g.*, S. 2338, *supra*. Other proposals would have gone further and eliminated the judicial review provision altogether. *E.g.*, S. 1400, *supra*. Petitioners now ask this Court to impose judicially precisely the statutory changes that Congress declined to adopt. In these circumstances, it would be inappropriate to enact a legislative scheme that "Congress considered and rejected." *Pac. Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 220 (1983); see also *FDA*, 529 U.S. at 144.

Petitioners (at 26) recite the objection that Congress may fail to enact legislation for any number of reasons, such that it is unclear why Congress did not enact these statutes. But even if that

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[9] Congress adopted Act of Sept. 30, 1996, Pub. L. No. 104-208, § 658(c), 110 Stat. 3009, 3009-372; Act of Oct. 11, 1996, Pub. L. No. 104-294, § 607(c), 110 Stat. 3488, 3511; and Act of Feb. 10, 1996, Pub. L. No. 104-106, § 1624(b)(3), 110 Stat. 186. Congress declined to adopt H.R. 4193, 107th Cong., 2d Sess. § 7 (2002); S. 2310, 106th Cong., 2d Sess. § 3 (2000); S. 995, 106th Cong., 1st Sess. § 311 (1999); H.R. 1501, 106th Cong., 1st Sess. § 608 (1999); H.R. 2037, 106th Cong., 1st Sess. § 508 (1999); H.R. 3954, 105th Cong., 2d Sess. § 3 (1998); S. 723, 105th Cong., 1st Sess. § 4 (1997); H.R. 3455, 104th Cong., 2d Sess. § 5 (1996); S. 1632, 104th Cong., 2d Sess. § 5 (1996); H.R. 3746, 103d Cong., 2d Sess. § 102 (1994); and H.R. 4763, 103d Cong., 2d Sess. § 2 (1994).

argument were given its full force in this context, it would only reinforce respondent's position: such uncertainty precludes any finding that Congress impliedly repealed Section 925(c) through appropriations legislation. That is so because, as noted (see *supra* at 17-19), such an implied repeal must rest on an unambiguous statement of congressional intent.

The inferences properly drawn from these failed proposals to repeal Section 925(c), moreover, are unusually strong. The legislation was opposed based on "the bill's stripping of the right of the applicant denied relief by the Secretary to petition the district court for review of the denial." *Stop Arming Felons Act: Hearing Before the Subcomm. on the Const. of the Comm. on the Judiciary*, 102d Cong., 2d Sess. 8 (1992) (Sen. Hatch). At the very lea , the failed proposals establish that Congress knew that the federal courts regarded the provisos to ATF's budget as ambiguous on the question whether they repealed applicants' right to judicial review, yet failed to adopt the "clear" statement that this Court's precedents require to repeal that right. That is so because in 1997, the legislation's proponents unsuccessfully sought to overrule the Third Circuit's holding in *Rice* v. *United States*, 68 F.3d 702 (1995), that judicial review remains available under Section 925(c). H.R. 1228, *supra*; 143 Cong. Rec. H1292 (daily ed. Apr. 8, 1997) (Rep. Morella). Also of note, the attempt to amend the 1996 House appropriations bill (see Treasury, Postal Service, and General Government Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-319) to eliminate the right to judicial review was barred by the Chairman of the House as violative of the provision of House Rule 21 that "[n]o amendment to a general appropriation bill shall be in order if changing existing law." 142 Cong. Rec. H7678-79 (daily ed. July 17, 1996). This exchange is cited in the House Rules Manual as an example of an impermissible attempt to add substantive legislation to an appropriations bill. H.R. Doc. No. 106-320, at 819-20 (2001). This Court, of course, relied on *precisely* that Rule in adopting an exceedingly stringent standard for establishing implied repeals by appropriations law. *Will*, 449 U.S. at 221-22; see *supra* at 18.[10]

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In light of the foregoing, there manifestly is no reason to stretch either settled canons of construction or the statutory text in order to find Section 925(c) to be repealed. This Court has only found an implied repeal by appropriations law three times in the past century. *Robertson* v. *Seattle Audobon Soc'y*, 503 U.S. 429 (1992); *Will, supra*; *United States* v. *Dickerson*, 310 U.S. 554 (1940). In enacting appropriations statutes, Congress acts against the firmly settled understanding that such measures will repeal substantive law in only the most exceptional circumstances and only upon unequivocal declarations of congressional intent, neither of which is present here. If Congress actually intends to eliminate the availability of judicial review under Section 925(c), it can easily do so in a single sentence in a single bill – more easily, in fact, than by legislating annually as it has done in the past. And if Congress intends to produce that result and prefers to do so through appropriations legislation, it can and should include such a provision in the Treasury Department's next appropriations measure. On the other hand, refusing to give effect to Section 925(c) will open the door to numerous other claims of implied repeals when the Executive Branch or private litigants prefer not to comply with a statute on the books. There is no real doubt that the branches of government will operate better, and Congress's intent will be more faithfully implemented, through adherence to the statutory text.

Petitioners' claim that provisos to ATF's budget have impliedly repealed Section 925(c) thus can be sustained, if at all, based only on the most definitive proof of Congress's intent. A

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[10] Thus, although petitioners cite a single legislator's statement as supposedly suggesting an intent to impliedly repeal individuals' right to judicial review (Pet. Br. 23 (quoting 142 Cong. Rec. 27,066 (1996) (Sen. Simon)) they fail to acknowledge that this statement was actually made in support of the proposed 1996 appropriations amendment *that failed*. See 142 Cong. Rec. S10,139 (daily ed. Sept. 10, 1996) (reporting 1996 appropriations act with failed amendment in Senate).

clear statement by Congress in the statutory text is the only way to "assure[] that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 109 (1991) (quoting *Bass*, 404 U.S. at 349). But as respondent shows in the following sections, petitioners have failed to identify anything resembling such a clear statement. The lower courts in this case therefore properly construed Section 925(c) and the appropriations statutes in order to give effect to each.

II. The Lower Courts Properly Harmonized Section 925(c) and the Appropriations Statutes Governing ATF.

In holding that jurisdiction existed in this case and that respondent was entitled to relief from firearms disabilities, the lower courts accommodated not only the unambiguous command of all the relevant statutory enactments but also the "concerns expressed by Congress" in ATF's annual appropriations measures. Pet. App. 28a. This case thus demonstrates that giving effect to the right to judicial review expressly conferred by Section 925(c) is not only faithful to Congress's intent but also entirely practicable. Petitioners' contrary arguments attack only a distorted caricature of the lower courts' decisions.

Congress has provided that a "person," including any "individual," who is subject to firearms disabilities "may make application to the Secretary for relief." 18 U.S.C. 925(c), 921(a)(1). The regulation implementing Section 925(c) provides, in turn, that the applicant must establish an evidentiary foundation for the request by attaching various "supporting data." 27 C.F.R. 178.144(b). This includes, at a minimum, "a written statement from each of 3 references, who are not related to the applicant by blood or marriage and have known the applicant for at least 3 years, recommending the granting of relief." *Id.* § 178.144(c)(1). In this case, respondent's application sets forth detailed information regarding his personal history and the circumstances of his conviction, and also appended five letters of recommendation from law enforcement officers and a state judge. J.A. 27-32.

No provision of law precludes the Secretary from exercising his statutory authority and duty to personally grant relief under Section 925(c). The Treasury Department's own policy, however, is to refer all such applications to ATF. Although ATF does not "investigate" or otherwise "act" on the application (*e.g.*, Pub. L. No. 105-277, 112 Stat. 2681-485), it is not required to ignore the application or hold it in abeyance. ATF's practice instead has been to return applications with an express statement that no action would be taken. This refusal to act "constitutes a de facto denial" of the application – for it would at that point be "wholly futile or inadequate" for the applicant to continue to pursue administrative action – giving rise to a right to "judicial review." Pet. App. 30a; see also *infra* Part II-B. In this case, when ATF advised respondent that it would not take any action on his application (J.A. 33-34), he properly filed a petition in federal district court (*id.* 8-15).

In court, the applicant may seek to present "additional evidence" beyond that already included with the administrative application. 18 U.S.C. 925(c); see also THE NEW OXFORD AM. DICT. 18 (2001) (defining additional as "added, extra, or supplementary to what is already present or available").[11] The court, however, may only "consider" that evidence "where failure to do so would result in a miscarriage of justice." 18 U.S.C. 925(c). The statute thus establishes a rigorous "threshold" standard that the application must satisfy to receive *any* consideration. *Palma* v. *United States*, 228 F.3d 323, 329 (CA3 2000).

If this preliminary bar is overcome, the applicant is required to pay the full cost of any "investigative work [that] needs to be done," a requirement that accommodates Congress's concern in the appropriations measures that ATF was expending millions of dollars to investigate applications. Pet. App. 28a, 29a. In deciding whether the evidence is sufficient to proceed past the

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[11] As the dictionary definition of "additional" makes clear, the court could admit further evidence even if none were compiled at the administrative stage. Contra Pet. Br. 19-20. On petitioners' contrary view, the Secretary could strip federal courts of jurisdiction by the expedient of refusing to compile an administrative record.

"threshold" stage and consider the petition's merits, the court has the benefit of the statutory and regulatory criteria for granting relief, as well as information on "how the ATF had conducted its investigations in the past." *Id.* 29a; 18 U.S.C. 925(c); 27 C.F.R. 178.144(d). At all stages, the "burden [is] on the applicant" to present sufficient evidence regarding matters such as his "record, reputation, and the underlying reason for the disability." Pet. App. 28a. Not only will the government have the opportunity to contest the applicant's proof but, as explained in the legislative history quoted by petitioners (at 20-21), the court can "request the presence of an agent representing the Secretary, and stay the action for a suitable time to permit the Secretary to review his finding in light of the additional evidence. It would then proceed if that evidence did not alter the Secretary's determination" (S. Rep. No. 583, 98th Cong., 2d Sess. 27 (1984)). If the district court, after consulting with the government, concludes that the evidentiary record still contains gaps precluding a confident determination that firearms rights should be restored, and thus that the applicant failed "to secure all the necessary evidence," the court will simply deny relief. Pet. App. 28a.

District judges are ideally suited to determining whether firearms rights should be restored. Congress recognized as much in authorizing judicial review in the first instance. And, "part of the day-to-day role of the court is to make character determinations of the individuals before it" and to resolve other "adjudicative" disputes indistinguishable from those raised under Section 925(c). Pet. App. 28a-29a. Cf. *Hilton* v. *Braunskill*, 481 U.S. 770, 777 (1987) (in determining whether to release successful habeas petitioner pending final resolution of case, district court considers, *inter alia*, "risk that the prisoner will pose a danger to the public"); *United States* v. *Salerno*, 481 U.S. 739, 751 (1987) (upholding constitutionality of Bail Reform Act of 1984, pursuant to which district court evaluates, *inter alia*, likelihood of future dangerousness). Moreover, the fact that federal law restores firearms rights under Section 921(a)(20) whenever provided by state law demonstrates beyond peradventure that Congress does not regard ATF as "solely and specially capable" of making such a determination. Pet. App. 25a. In-

deed, fourteen states restore firearms rights automatically upon completion of the defendant's sentence. Five more do so through application to a judge. See *infra* at 15a.

Even so, the Fifth Circuit insisted that district courts exercise the jurisdiction conferred by Section 925(c) sparingly. In the rare cases in which the district court determines at the threshold that the failure to grant relief would constitute a miscarriage of justice but the Secretary continues to oppose the application notwithstanding the additional evidence compiled by the applicant, the court may grant relief only when it finds that "any reasonable observer" would conclude that the statutory standard has been satisfied. Pet. App. 11a. A particularly important criterion is whether the disability arises from a "technical or unintentional" offense, for the statute specifically reflects Congress's determination that it was "essential" to adopt a "safety valve" "[m]aking relief available" to persons "convicted of technical or unintentional violations." *Id.* 4a-5a; S. Rep. No. 583, *supra*, at 26. This rigorous test is faithful to the statutory text (which grants the Secretary discretion but unambiguously subjects that discretion to "judicial review" (18 U.S.C. 925(c))), effectuates Congress's desire in the appropriations measures to curtail the large proportion of cases in which ATF had granted relief (see *supra* at 5), and avoids "empower[ing] district courts to assume the agency's role." (Pet. Br. 8). It also is reflective of the great restraint in applying Section 925(c) that has uniformly been shown by the federal courts, which ultimately have granted relief from firearms disabilities in only a *handful* of cases since 1965. Pet. App. 12a-38a (this case); *Rice* v. *United States*, No. 93-6107, 1997 U.S. Dist. LEXIS 1126 (E.D. Pa. Jan. 31, 1997); *In re Petition of Porrazzo*, 771 F. Supp. 304 (D. Nev. 1991).[12]

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[12] The experience in the Third Circuit is particularly instructive. After that court held in 1995 in *Rice*, 68 F.3d at 710, that the right to judicial review had not been repealed, district courts in the Third Circuit were very rarely presented with Section 925(c) petitions. *Rice* v. *United States*, No. 93-6107, 1997 U.S. Dist. LEXIS 1126 (E.D. Pa. Jan. 31, 1997); *Pontarelli* v. *United States Dep't of the Treasury*, No. 98-5081, 2000 U.S. Dist. LEXIS 2702 (E.D. Pa. Mar. 10, 2000), *rev'd*,

It is undisputed that respondent satisfies the stringent requirements for securing judicial relief under Section 925(c) established by the lower courts. "The facts of this case illustrate in caps underscored why Congress added the relief provision to the Federal Firearms Act." Pet. App. 1a. Respondent was "at most * * * negligent" in not absolutely ensuring that all ammunition had been removed from his vehicle before arriving at the Mexican border (*id.* 11a), for there is no dispute that he instructed an assistant to do so (*id.* 13a). Furthermore, Section 925(c) is the only mechanism to avoid a basic "miscarriage of justice" in this case, given that respondent's inability to possess firearms caused him to "lose his livelihood" (*id.* 11a), and that he was convicted without a trial and through the use of a "confession" he was required to sign in a language he did not understand (*id.* 32a). The district court further found as a matter of fact – based on, *inter alia*, the extensive submissions of numerous law enforcement officers having personal knowledge of respondent and his professional dealings as a firearms licensee – that respondent is an individual of absolutely unimpeachable character who presents no danger to the public and is properly trusted to possess a firearm. See *supra* at 10-11. Indeed, "the record is replete with testimony from legislators, law enforcement officers and BATF agents as to [respondent's] lawful character." Pet. App. 5a-6a n.9. Respondent was ready to produce additional evidence to meet any argument by petitioners that this proof was lacking in any way, but they made no such claim. And the district judge was ideally suited to make these factual determinations regarding respondent's character, having previously overseen his supervised release with the benefit of the reports and investigation of the U.S. Probation Office.

III. Congress Has Not Impliedly Repealed 18 U.S.C. 925(c).

As respondent showed in Part I, *supra*, petitioners' claim that the judicial review provision of Section 925(c) has been re-

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285 F.3d 216 (3d Cir. 2002); *Palma* v. *United States*, 48 F. Supp. 2d 481 (E.D. Pa. 1999), *rev'd*, 228 F.3d 323 (3d Cir. 2000). See generally BIO 16; U.S. BIO, No. 95-2015, *McGill* v. *United States* 11.

pealed must overcome not only the special disfavor accorded repeals by implication in appropriations statutes, but also the strong presumption that federal courts will exercise jurisdiction conferred upon them by Congress, the Rule of Lenity, and the doctrine of constitutional avoidance. But petitioners' attempt to make the required showing of an unambiguous congressional intent to effect an implied repeal faces two insuperable obstacles: Congress easily could have expressed that intent; and Congress declined to adopt several proposals that would have done just that. In the face of these gaping flaws in their theory, petitioners seek to cobble together other, indirect indicia of a congressional intent – that applications for relief from firearms disabilities are not "denied"; that the legislative history demonstrates an intent to repeal Section 925(c); and that judicial review of firearms applications conflicts with the Administrative Procedure Act. Not only is each of these arguments wrong both factually and legally, but none would in any event constitute the clear and unambiguous expression of congressional intent required to establish an implied repeal by appropriations law under this Court's precedents.

A. Applications for Relief from Firearms Disabilities Are "Denied" Under the Appropriations Acts.

Petitioners' principal contention is that Congress has repealed the administrative relief provisions of Section 925(c) and, as such, has removed an essential predicate to judicial review. They couch this claim in terms of the supposed inability of the Secretary to "deny" applications for relief under the appropriations statutes.

1. Petitioners' argument fails at the outset because it is self-defeating even if true. They identify a supposed conflict between the appropriations statutes and the provision of Section 925(c) conditioning the right to judicial review on the "denial" of an application. But under the principle that statutes must be rationalized to the extent possible, any implied repeal is limited "to the extent of the conflict." *Posadas* v. *Nat'l City Bank*, 296 U.S. 497, 503 (1936). The consequence of petitioners' argument would therefore be to hold that the requirement of a "*denial*" has been impliedly repealed – not, as petitioners suppose, to abro-

gate the right to judicial review. "If Congress 'intended' to change anything, it deleted administrative action from the statute, but otherwise left judicial relief available." Pet. App. 24a. That conclusion is buttressed by the total absence of any indication in the text or legislative history of any intent by Congress to repeal the right to judicial review. On this view, applicants would be entitled to proceed to court once they compiled and submitted to the Secretary the application and supporting evidence required by the governing regulation. See *supra* at 7.

In any event, petitioners' premise that Congress has repealed "*the Secretary's* authority under Section 925(c) to grant to convicted felons relief from their firearms disabilities" (Pet. Br. 11 (emphasis added)) is just wrong. Petitioners – like each of the courts that embrace the construction which petitioners propose – totally ignore that the appropriations "provisos" apply only *to ATF*, a discrete component of the Department of the Treasury. Compare Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732, Unnumbered Section: "Bureau of Alcohol, Tobacco and Firearms – Salaries and Expenses," with *id.* §§ 101-108 (appropriations measures governing "Department of the Treasury – General Provisions").[13]

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[13] That the appropriations bar applies only to ATF and not to the Department of the Treasury as a whole is confirmed by the language of the proviso: "none of the funds appropriated *herein* shall be available * * *" (emphasis added). The term "herein" is used in appropriations acts to refer to the subsection in which the term appears, not to the entire Act. Thus, for example, the same appropriations act in which the ATF proviso appears contains, in the section labeled "Bureau of the Public Debt," a proviso allocating $191,353,000 for "expenses connected with any public-debt issues" and providing that "the sum appropriated *herein* from the General Fund for fiscal year 2002 shall be reduced by not more than $4,400,000 * * * so as to result in a final fiscal year 2002 appropriation from the General Fund estimated at $186,953,000." Treasury and General Government Appropriations Act, 2002, Pub. L. No. 107-67, 115 Stat. 514 (emphasis added). Plainly, the "sum appropriated herein" must be the $191,353,000 allocated in the *subsection*, because $191,353,000 minus $4,400,000 equals $186,953,000.

That is *not* to say that the Secretary could circumvent the appropriations statutes by "transfer[ring] the functions, missions, or activities of the Bureau of Alcohol, Tobacco and Firearms" with respect to Section 925(c) applications "to other agencies or Departments" (Pub. L. No. 107-67, 115 Stat. 514); he may not. Rather, by "grant[ing] relief" of his own accord the Secretary would be exercising his own power under Section 925(c) and not reallocating a function of ATF to himself. Although the Secretary has elected to delegate to ATF his responsibility for administering the firearms laws, that administrative delegation does not obviate "the dignity of the discretionary act which is confided solely to the agency head[]" (*Lewis* v. *NLRB*, 357 U.S. 10, 15 (1958)). The Secretary thus could not abdicate his statutory authority if he wanted to. And the delegation order not surprisingly disclaims any such intent: the Secretary granted the Director of the ATF authority to administer "18 U.S.C. Chapter 44 (relating to firearms)," which includes Section 925(c), but provided that this authority is subject to the "direction of the Secretary of the Treasury [and] the supervision of the Assistant Secretary." Treas. Dep't Order No. 221, §§ 1, 2(d), *Establishment of the Bureau of Alcohol, Tobacco and Firearms*, 1972-1 C.B. 777, *reproduced infra* at 16a. Accord Br. for the U.S., No. 84-1904, *United States Dep't of the Treasury* v. *Galioto* 2 (Section 925(c) "empowers the Secretary of the Treasury (and through him his delegate, the Director of the Bureau of Alcohol, Tobacco and Firearms (BATF)) to lift the disabilities imposed" by federal law); J.A. 33 (ATF denial letter acknowledging that Section 925(c) "provides the Secretary of the Treasury with the authority to grant relief from this disability"). Thus, nothing in the appropriations measure purports to preclude – much less unambiguously forbid – the Secretary from exercising the power conferred by Section 925(c) to grant relief to a deserving applicant in an appropriately exceptional case such as this one. Congress easily could have put a restriction in the Treasury Department's general budget to forbid the Secretary from acting on

applications, but it has never done so. Indeed, petitioners' position reduces to the absurd proposition that if the Secretary had *ever* personally exercised the power unambiguously conferred by Section 925(c) to grant an application under Section 925(c), that action would have been *ultra vires* and unlawful.[14]

2. In any event, petitioners' position cannot be sustained by narrowly reading "denial" to encompass only an affirmative order by the Secretary or ATF rejecting an application "on the merits." That construction would read the express right to judicial review out of Section 925(c) by reading into the appropriations statute a provision that Congress could have adopted but did not. And even if petitioners' reading were one plausible interpretation of the statute, it manifestly would not be the only one. Petitioners hope to create an inconsistency between the appropriations measures and Section 925(c) that, in effect, causes the latter provision to self-destruct. But it is settled that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). "[W]henever possible, statutes should be read consistently." *Kremer* v. *Chem. Constr. Corp.*, 456 U.S. 461, 468 (1982).

Indeed, petitioners' interpretation of "denial" must overcome the *further* "strong presumption that Congress intends judicial review" of agency action. *Bowen* v. *Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). That presumption applies

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[14] Nor can petitioners recharacterize the appropriations acts as simply eliminating the "predicate" for judicial review, as opposed to impliedly repealing the statutory right to judicial review. "Both types of 'repeal' – effective and actual – involve the compromise or abandonment of previously articulated policies, and we would normally expect some expression by Congress that such results are intended. Indeed, the expectation that there would be some expression of an intent to 'repeal' is particularly strong in a case like this one, in which the 'repeal' would extend to virtually every case to which the statute had application." *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 169 (1976).

with particular force when, as here, the Court is asked to find "a total preclusion of [judicial] review." *Shalala* v. *Ill. Coun. on Long Term Care*, 529 U.S. 1, 19 (2000). But petitioners fail to offer anything like the "'clear and convincing evidence' of a contrary legislative intent" (*Abbott Labs.* v. *Gardner*, 387 U.S. 136, 141 (1967)) required to sustain their position. Of note, *nothing* in the statutory text or legislative history of the ATF appropriations statutes or Section 925(c) contains the slightest suggestion that Congress intended to preclude individuals from securing judicial review of the Secretary's refusal to act. Instead, the statute evinces the common intention to require applicants to exhaust their administrative remedies (see Pet. App. 29a-30a), which petitioners concede (at 26) has occurred in this case.

An interpretation that reconciles the appropriations statutes with Section 925(c) is not only plausible, but in fact represents by far the better reading. Petitioners are no doubt correct that, prior to the appropriations statutes, judicial review under Section 925(c) was generally triggered by ATF's "denial" of the application "on the merits." But the statute is not conditioned on the Secretary's "denial" taking that form and that prior practice simply is not relevant to the question whether the appropriations statutes and Section 925(c) now stand in "irreconcilable conflict." They do not. In refusing to act, ATF has "denied" respondent's application because it manifestly has "'refus[ed] to grant, assent to, or sanction'" the relief he seeks. Pet. Br. 18 (quoting definition of "denial" in WEBSTER'S THIRD NEW INT'L DICT. 602 (3d ed. 1993)). ATF does not hold applications in limbo but rather affirmatively rejects them, stating that it will not act. See J.A. 33-34. That refusal to grant relief constitutes a literal, or at least a *constructive*, denial of the application because it "has precisely the same impact on [the applicant] as denial" on the merits. *Envtl. Def. Fund* v. *Hardin*, 428 F.2d 1093, 1099 (CADC 1970). "A reviewing court may treat administrative delay as a denial of what moving parties seek and provide immediate review." KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 14.12, at 54 (2d ed. 1983). See also *Clouser* v. *Espy*, 42 F.3d 1522, 1532 n.12 (CA9 1994) (administrator's refusal to

act on application qualifies as "written decision[] * * * related to issuance, denial, or administration" of application under 36 C.F.R. 251.82(a)), *cert. denied*, 515 U.S. 1141 (1995); *Pauley Petroleum, Inc.* v. *United States*, 591 F.2d 1308, 1323 n.23 (Ct. Cl.) (refusal to act eventually becomes "denial" of relief within meaning of APA § 555(e)), *cert. denied*, 444 U.S. 898 (1979).[15]

3. The conclusion that ATF "denied" respondent's application is confirmed by Section 925(c) and the implementing regulation promulgated by the Secretary, neither of which recognizes the indeterminate netherworld – neither granted nor denied – into which petitioners contend all applications fall under the appropriations statutes. The statute provides that an application to the Secretary will result in one of two forms of "final action": relief may either be "grant[ed]" or "denied." Further, not even petitioners can offer a theory under which Congress has repealed the right of individuals to "make application to the Secretary" (18 U.S.C. 925(c)), yet their argument turns this statutory right into an utterly empty exercise for the applicant. Congress also enacted the judicial review provision of Section 925(c) to *expand* the relief that the federal courts had already held to be available under the APA (see *supra* at 2), under which the Secretary's failure to act would plainly give rise to federal court ju-

[15] An agency's *failure* to act is similarly subject to judicial review when such inaction amounts to "the equivalent of an order denying relief." *Hardin*, 428 F.2d at 1099. See also *Coalition for Sustainable Res., Inc.* v. *United States Forest Serv.*, 259 F.3d 1244, 1251 (CA10 2001); *Sierra Club* v. *Glickman*, 156 F.3d 606, 618 n.7 (CA5 1998); *Sierra Club* v. *Thomas*, 828 F.2d 783, 793 (CADC 1987); *Dabone* v. *Karn*, 763 F.2d 593, 597 n.2 (CA3 1985) ("[W]e may treat the Board's unjustified failure to act within a reasonable period as an effective denial of the motion to reopen."); *Pub. Citizen Health Research Group* v. *FDA*, 740 F.2d 21, 32 (CADC 1984); *NRDC* v. *Fox*, 93 F. Supp. 2d 531 (S.D.N.Y. 2000), *aff'd*, 268 F.3d 91 (CA2 2001); *Zamore* v. *Dyer*, 597 F. Supp. 923, 928-31 (D. Conn. 1984) (treating agency inaction as denial and reversing as arbitrary and capricious). To hold otherwise would allow administrative agencies to preclude judicial review by simply ignoring requests put to them. *Sierra Club* v. *Thomas*, 828 F.2d at 793.

risdiction, as petitioners themselves concede (at 18). By contrast, this Court could hold that ATF has not "denied" respondent's application only by accepting that Congress amended the statute to *limit* the availability of judicial review.[16]

Moreover, Section 925(c) on its face indicates that Congress did not categorically intend to require the Secretary to take affirmative steps before a court may review an ATF denial because it allows the reviewing court in appropriate cases to "admit additional evidence." Section 925(c) thus contrasts with other statutes that permit judicial review only of, for example, "the Secretary's final decision *after such hearing* as is provided" at the administrative stage. 42 U.S.C. 1395cc(h)(1) (emphasis added), *discussed in Shalala* v. *Ill. Council on Long Term Care*, *supra*.

Finally, petitioners' reading cannot be reconciled with the regulation implementing Section 925(c), which provides that a firearms licensee who applies for relief may continue operating up to "30 days following the date the Director issues notification that the licensee's applications for removal of disabilities *has been denied*" (27 C.F.R. 178.44(i)(3) (emphasis added)). Petitioners' position would have the perverse and implausible effect of permitting licensees subject to firearms disabilities to operate indefinitely because their applications supposedly are never "denied" under the appropriations statutes.

Although petitioners emphasize (at 12) that Congress intended to preclude ATF from granting relief to firearms applicants, that fact does not abrogate the statutorily conferred jurisdiction of the district courts. Section 925(c) grants an unambiguous right to judicial review based on any "denial" of relief, whatever the reason. In any event, petitioners' argument in reality undermines their assertion of an implied repeal. It is common ground that Congress intended to require ATF to reject administrative applications for relief, whether because Congress

[16] Petitioners' contention that ATF's refusal to act does not trigger respondent's right to judicial review is thus irreconcilable with their contention (at 3, 18-21) that this case is governed by the APA.

believed that relief from firearms disabilities should *never* be granted (according to petitioners) or instead because it made a cost-benefit determination that ATF's large expenditures of funds justified shifting the funding for ATF's administrative process to another program (according to respondent). Whatever Congress's precise intention, there is no dispute that the appropriations bars have the same purpose and effect as a statutory mandate that ATF summarily deny all applications for relief from firearms disability. Such a purposeful and categorical refusal to grant relief falls squarely within Section 925(c)'s provision permitting persons whose applications are "denied" to seek judicial review.

Petitioners' position is also contrary to basic principles of administrative law. It would attribute to Congress an intent to permit the Secretary to evade judicial review of any application by refusing to take action, including with respect to applications by corporations, which even petitioners admit (at 3) may continue to seek relief in court notwithstanding the appropriations acts. In this respect, petitioners' position would also have the potential to undermine Congress's intent to provide judicial review under numerous other statutory schemes that condition the right to proceed to court on the "denial" of relief. None of these provisions suggests that the applicant need do more than exhaust available administrative remedies to secure judicial review.[17]

The weakness of petitioners' proposed interpretation of "denial" is ultimately demonstrated by the ease with which the single case they cite (at 18) is properly distinguished. *Your Home Visiting Nurse Services* v. *Shalala*, 525 U.S. 449 (1999), involved a section of the Medicare Act providing that judicial review was available with respect to "a final determination * * *

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[17] See, *e.g.*, 7 U.S.C. 136a(d)(3) (FIFRA); 8 U.S.C. 1160(e)(3)(A) (immigration); 8 U.S.C. 1421(c) (naturalization); 15 U.S.C. 766(c) (FERC); 15 U.S.C. 3412(c) (Natural Gas Act); 18 U.S.C. 843(e)(2) (explosives permits); 42 U.S.C. 6393(a)(4) (energy conservation); 42 U.S.C. 6976(a) (solid waste disposal); 42 U.S.C. 7194(b)(1) (adjustments relating to energy conservation); 42 U.S.C. 7661d(b)(2) (air pollution).

as to the amount of total program reimbursement." 42 U.S.C. 1395oo(a)(1)(A)(i). The question presented was whether jurisdiction existed over the agency's refusal to "reopen" a prior final determination. The Court held that judicial review was not available because a refusal to "reopen" was not a final determination as to the "amount of * * * reimbursement" (525 U.S. at 453) and further because Congress had not departed from "the traditional rule of administrative law that an agency's refusal to reopen a closed case is generally 'committed to agency discretion by law' and therefore exempt from judicial review" (*id.* at 455). This case, by contrast, presents no issue relating to the reopening of an agency decision.

B. Petitioners' Resort to Legislative History Is Unavailing.

Petitioners fare no better with their attempt to persuade the Court that the legislative history of the appropriations statutes establishes an implied repeal of Section 925(c). This Court's precedents are clear that "an implied repeal must ordinarily be evident from the language or operation of a statute." *Kremer* v. *Chem. Constr. Corp.*, 456 U.S. 461, 470 (1982). "The whole question depends on the intention of Congress *as expressed in the statutes*." *United States* v. *Will*, 449 U.S. 200, 222 (1980) (quoting *United States* v. *Mitchell*, 109 U.S. 146, 150 (1883) (emphasis added)). As such, "passing references" in legislative history do "not constitute the 'clear and manifest' evidence of congressional intent necessary to establish repeal by implication." *Rodriguez* v. *United States*, 480 U.S. 522, 525 (1987). See also *Allen* v. *McCurry*, 449 U.S. 90, 97-99 (1980). "[I]ndefinite congressional expressions" in legislative history simply "cannot negate plain statutory language and cannot work a repeal or amendment by implication." *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 788 (1981).

This rule makes perfect sense: not only is legislative history a far less accurate reflection of Congress's intent than statutory text but, at the most basic level, it lacks the force of law. To take the most obvious example, even a joint, unanimous declaration of both houses of Congress will not suffice to repeal a duly enacted statute, any more than would a unicameral veto (see *INS*

v. *Chadha*, 462 U.S. 919, 956 (1983)). Further, such arguments inevitably beg the question of *which* legislative history is relevant. Thus, petitioners repeatedly emphasize a few sentences from two 1992 committee reports regarding the appropriations measures but ignore altogether the legislative history of the supposedly repealed statute. "[E]ach time" Congress has amended Section 925(c), it has acted "with a concern toward those persons who possess guns in a lawful manner but are denied possession of firearms because of unrelated felony convictions." Pet. App. 24a. This legislative history, as a whole, demonstrates Congress's determinations that "not all persons convicted of felonies should be denied firearms privileges forever" and that "the judiciary [should] give the final word on the appropriateness of a denial" of relief under Section 925(c). *Id.* 22a.

Petitioners' contrary reliance on the legislative history of the appropriations measures is furthermore mystifying because there is *no* legislative history for the "ATF appropriations for fiscal year 1999" (J.A. 34 (ATF denial letter)) at issue in this case. Petitioners rely exclusively on statements that relate to earlier appropriations statutes, which are simply inapposite. There is not even any relevant legislative history for any of the appropriations statutes subsequent to 1995, the year in which the Third Circuit held in *Rice* v. *United States*, 68 F.3d 702 (1995), that judicial review was still available under Section 925(c) – except, that is, the failed attempt to include a provision to overrule that decision (see *supra* at 24). Only a minority of the members of the House of Representatives (161) and a thin majority of the members of the Senate (62) who voted on the 1999 appropriation at issue in this case even held those seats at the time of the 1992 remarks on which petitioners principally rely. Of these "returning" members, almost half of those who voted in favor of the 1992 appropriation (101) voted *against* the 1999 appropriation. But even engaging in the assumption that legislators, in considering ATF's F.Y. 1999 appropriation, were aware of or recalled the sentences from the extensive 1992 committee reports quoted by petitioners – and the utter and total absurdity of that vital assumption in petitioners' argument speaks for itself – those sentences do not purport to describe later appropriations.

"The recurrent nature of the appropriation process guarantees annual reconsideration" and thus "successive opportunities for political fragmentation." *Meek* v. *Pittenger*, 421 U.S. 349, 372 (1975), *overruled on other grounds*, *Mitchell* v. *Helms*, 530 U.S. 793 (2000). As *Amicus* VPC maintains (at 13), the "suspension of the legislation in the appropriations bill (as in this case) effectively forces Congress to revisit the issue each year as part of the annual appropriations process." The legislative history of the 1992 appropriation is accordingly totally uninformative here.

If anything, this is "a textbook case on why the courts should be hesitant to use legislative history to suspend any substantive right which is expressly available in statutes." Pet. App. 27a. Few issues are as hotly contested in Congress as firearms law. Sophisticated advocates on all sides maneuver to advance their agendas by passing legislation or, if that fails, planting supposed "legislative history" that is not necessary faithful to the statute as enacted or reflective of the views of most legislators. This Court ought not encourage such tactics by giving effect to such unreliable indicia of actual legislative intent.[18]

Even if the excerpts cited by petitioners were relevant, they still would not establish an implied repeal. The few sentences petitioners cite (at 4, 12-13) state the views not of the full House or Senate but instead, at most, of the respective appropriation committees. See, *e.g.*, S. Rep. No. 353, 102d Cong., 2d Sess. 1 (1992) ("The Committee on Appropriations * * * reports to the Senate with various amendments, and presents herewith information relative to the changes recommended."). This Court squarely rejected reliance on such materials in *TVA* v. *Hill*, 437 U.S. 153, 191-92 (1978), explaining that they cannot be "equated with statutes enacted by Congress," both because the appropriations committees lack jurisdiction over substantive legislation and because there is no evidence that "Congress as a whole" was even aware of, much less adopted, the committees'

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[18] For example, the 1996 House Report (H.R. Rep. No. 660, 104th Cong., 2d Sess. 26) asserts that ATF's appropriation eliminates the right to judicial review for certain felons, when that statement in reality relates to a version of the bill that Congress declined to adopt.

views. See also *id.* at 192 (declining to find an implied repeal based on "a few isolated statements" in lengthy committee reports (quoting *SEC* v. *Sloan*, 436 U.S. 103, 121 (1978)). The *TVA* Court explained this preference for the views of the committee with "jurisdiction" over the substantive issue by noting that the Appropriations Committee had not conducted "the type of extensive hearings which preceded passage" of the earlier substantive legislation allegedly repealed by appropriations (*id.* at 191), a fact that is equally true in this case (see *The Federal Firearms Owner Protection Act: Hearing Before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983)).

There is, moreover, not a single reference in any of the reports petitioners cite to the availability of judicial review, much less a suggestion of an intent to repeal the statutory right to judicial review, *much less* a *clear and unambiguous* statement to that effect – which is, of course, what this Court's precedents actually require. See *supra* Part I. Nor is there any reason to believe that Congress viewed court proceedings under Section 925(c) to be problematic. In the entire period between the enactment of Section 925(c) in 1965 and the first appropriations ban in 1993, it appears that a court reinstated an individual's firearm rights only *once*. *In re Petition of Porrazzo*, 771 F. Supp. 304 (D. Nev. 1991).

Even with respect to the availability of relief under Section 925(c) generally, the legislative history of the various appropriations measures is filled only with "contradictory statements" that are objectively read as demonstrating that "Congress was concerned with the ATF's inefficient and wasteful administrative review process rather than a desire to curb the availability of relief itself." Pet. App. 20a, 24a. Supporters of the legislation emphasized that "[s]ince 1985, well over 2,000 waivers have been granted at a cost to taxpayers of nearly $10,000 per waiver," and that "[t]he total cost for the years from 1985 to 1991 for handling those waivers exceeded $20 million." *Stop Arming Felons Act: Hearing Before the Subcomm. on the Const. of the Comm. on the Judiciary*, 102d Cong., 2d Sess. 3 (1992) (Sen. Lautenberg). ATF's excessive spending was also a principal concern raised by the Violence Policy Center report that

gave rise to the public debate over the program. See *supra* at 3. Congress determined that those funds would be better spent fighting violent crime and thus reallocated them to the Armed Career Criminal Apprehension Program. See *supra* at 4. Indeed, at the time the appropriations ban was imposed, even the United States read it to reflect "Congress's choice not to fund firearms rights restoration procedures *during times of fiscal restraint*." Br. for the U.S., No. 93-445, *Beecham* v. *United States* 25 n.14 (emphasis added). Contra Pet. Br. 13, 21-23.

The most that can be said in support of the few excerpts from the committee reports cited by petitioners is that they reflect the view of the appropriations committees that ATF's large expenditures to investigate firearms applications were insufficient to justify the benefit received, in part because ATF had awarded relief too freely. The Senate Report accompanying the 1992 appropriation thus discusses the appropriations ban in terms of the cost-benefit calculus of continuing to fund the program:

> After ATF agents spend many hours investigating a particular applicant they must determine whether or not that applicant is still a danger to public safety. This is a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made. The [Appropriations] Committee believes that the approximately 40 man-years spent annually to investigate and act upon these investigations and applications would be better utilized to crack down on violent crime.

S. Rep. No. 353, 102d Cong., 2d Sess. 19-20 (1992). The parallel House Report discusses the appropriations ban in the same terms:

> After ATF agents spend many hours investigating a particular applicant for relief, there is no way to know with any certainty whether the applicant is still a danger to public safety. Needless to say, it is a very difficult task. Thus, officials are now forced to make these decisions knowing that a mistake could have devastating consequences for innocent citizens. Thus, the [Appropriations] Committee believes that

> the $3.75 million and the 40 man-years annually spent investigating and acting upon these applications for relief would be better utilized by ATF in fighting violent crime. Therefore, the Committee has included language which states that no appropriated funds be used to investigate or act upon applications for relief from Federal firearms disabilities.

H.R. Rep. No. 618, 102d Cong., 2d Sess. 14 (1992). The Fifth Circuit's decision in this case accommodates *all* those concerns, eliminating the financial burden on ATF while simultaneously establishing an exceedingly high bar to restoring firearms rights.

Petitioners' claim (at 8) that the purpose of the appropriations statutes was categorically to prohibit every felon from possessing firearms not only is not supported by the committee reports on which they rely, but it also "attributes to Congress irrationality and arbitrariness" (*Morton* v. *Mancari*, 417 U.S. 535, 548 (1974)) that cannot sustain a claim of an implied repeal. No one would suggest, and Congress plainly did not conclude, that every felony conviction – no matter what the circumstances – establishes that an individual is permanently unsuited to possess firearms. This case is a perfect example. Cf. 18 U.S.C. 921(a)(20) (exempting most white-collar crimes). Petitioners also claim that "each annual appropriations law thus reflects Congress's considered judgment that 'those who commit felonies should not be allowed to have their right to own a firearm restored.'" Pet. Br. 13 (quoting H.R. Rep. No. 183, 104th Cong., 1st Sess. 15 (1995)). But the single sentence from the 1995 House Appropriations Committee Report petitioners quote cannot be reconciled with Section 921(a)(20), under which felons manifestly *are* "allowed to have their right to own a firearm restored." In more than a dozen states, the disability of Section 922(g)(1) is lifted immediately upon the expiration of the defendant's sentence or parole; numerous other states provide other mechanisms for relief from firearms disabilities. See *infra* at 15a. Congress elected to permit the broad and frequently automatic restoration of firearms rights under Section 921(a)(20) notwithstanding this Court's express recognition that it would essentially "circumvent" the narrower relief provision of Section 925(c). *Dickerson* v. *New Banner Inst.*, 460 U.S. 103, 117

(1983). Congress also was fully aware of the effect of Section 921(a)(20) in the debates over the appropriations measures,[19] but notably did not adopt proposals to repeal that provision. See, *e.g.*, S. 2304, 102d Cong., 2d Sess. § 2 (1992). The clause petitioners quote from the 1995 report thus most likely reflects the House Appropriations Committee's support for H.R. 2101, 104th Cong., 1st Sess. (1995), *reproduced infra* at 9a, which was being considered by the House Judiciary Committee that very month and which would have repealed both the ATF program and the right to judicial review and circumscribed the relief available under Section 921(a)(20), but which never passed.

For the foregoing reasons, this case stands in the most marked contrast to the previous instance in which this Court relied on legislative history to buttress its finding of an implied repeal, *United States* v. *Will*, *supra*. In four consecutive years, Congress "enacted statutes to stop or to reduce previously authorized cost-of-living increases initially intended to be automatically operative under [a pre-existing] statutory scheme" governing the salaries of various high-level government officials. 449 U.S. at 203. This Court held that Congress had thereby repealed the COLAs rather than deferring their payment and "consign[ing] them to the fiscal limbo of an account due but not payable." *Id.* at 224. The Court in *Will* held that the exceedingly strong presumption against implied repeals through appropriations law was overcome only based on an extraordinary array of evidence in the statutory text, which was supplemented and confirmed by the legislative history. For example, one of

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[19] *E.g.*, *Morning Edition: BATF Felon Gun Program A Campaign Issue?* (NPR radio broadcast July 30, 1992) (reporting view of then-Representative Charles Schumer, chair of the House Committee overseeing ATF, that "the bigger problem is not the BATF program * * * but that many states have their own programs to re-arm felons. Tens of thousands get their gun rights back automatically as soon as their sentences are complete."); David C. Morrison, *How Even the Strange Can Get Rearmed*, NAT'L J., Mar. 21, 1992, at 702 (reporting ATF official's statement that "[t]he real problem lies not in Washington but in state capitals * * * because convicted felons whose civil rights have been restored by state laws are exempted from the gun ban").

the statutes expressly stated that an annual COLA "shall not take effect," while the accompanying House Report stated that the COLA was thereby "eliminate[d]"; numerous "floor remarks of Senators and Representatives confirm[ed] this construction." *Id.* at 222 & n.24. The other statutes reflected the same intent, as confirmed not only by their sponsors but also by the accompanying reports and *dozens* of unambiguous, contemporaneous floor statements. *Id.* at 222-23 & nn.26-28. Not only is this case unlike *Will* because it does not involve "purely financial right[s] that Congress refused to fund" (Pet. App. 7a-8a & n.19), but petitioners are unable to point to even remotely analogous support in the text and legislative history of the provisos to ATF's appropriations for their claim of an implied repeal of the right to judicial review conferred by Section 925(c).

This case is instead controlled by *TVA* v. *Hill*, *supra*, which held that the Endangered Species Act was not partially repealed insofar as it applied to the Tellico Dam by Congress's decision to continue funding of the Dam. The Court found it critical that there was "nothing in the *appropriations measures, as passed*, which states that the Tellico Project was to be completed irrespective of the requirements of the Endangered Species Act." 437 U.S. at 189 (emphasis added). Although an array of statements in the House and Senate Appropriations Committees' Reports expressed the view that the Dam would not be subject to the ESA, those statements "cannot be equated with statutes enacted by Congress." *Id.* at 191. In any event, the Appropriations Committees lacked jurisdiction over environmental legislation, and "there is no indication that Congress as a whole was aware of TVA's position, although the Appropriations Committees apparently agreed with petitioner's views." *Id.* at 192.

C. There Is No Merit to Petitioners' Reliance on the Administrative Procedure Act.

Petitioners' final argument – that the relief respondent seeks is not available under the Administrative Procedure Act (Pet. Br. 18-19) – fails at the outset because this case is not subject to the APA. Indeed, petitioners' reading would render meaningless Congress's choice to adopt a special judicial review provision but not to apply the APA's standards to Section 925(c). When

Congress intends that the APA will apply to a statutory scheme, it regularly says so expressly.[20] Under Section 925(c) as originally enacted, the federal courts held that APA review was already available. *Kitchens* v. *Department of Treasury*, 535 F.2d 1197, 1199-1200 (CA9 1976). But Congress elected in 1986 to add a special judicial review provision. Act of May 19, 1986, Pub. L. No. 99-308, § 105(1)(D), 100 Stat. 449, 459. The original version of this bill would have applied the APA's standards – including particularly 5 U.S.C. 706, on which petitioners rely – but Congress eliminated that provision. S. 914, 98th Cong., 2d Sess. § 925(c) (1984) ("In a proceeding conducted under [Section 925(c)], the scope of judicial review shall be governed by [the APA]."); S. Rep. No. 583, 98th Cong., 2d Sess. 27 & n.58, 55-56 ("[S. 914] authorizes the scope of review provided under 5 USC 706."). In claiming that the APA governs the scope of judicial review under Section 925(c), petitioners inexplicably rely on the Senate Report for this version of the bill, which *was not adopted*. See Pet. Br. 3 (citing S. Rep. No. 583, *supra*, at 26-27 (1984)). "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983).[21]

Even assuming *arguendo* that the APA does apply to Section 925(c) proceedings, it obviously does so as a matter of judicial

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[20] See, *e.g.*, 12 U.S.C. 1818(h) (Section 8 of the Federal Deposit Insurance Act); 16 U.S.C. 1536(n) (Endangered Species Act); 18 U.S.C. 843(e)(2) (application to ATF for explosives materials license); 21 U.S.C. 360e(f)(4) (Food, Drug, and Cosmetic Act); 29 U.S.C. 214(c)(5)(G) (Fair Labor Standards Act); 30 U.S.C. 1416(d) (Deep Seabed Hard Mineral Resources Act); 42 U.S.C. 8433(d)(2)(B) (Power Plant and Industrial Fuel Use Act).

[21] Although the lower courts have held that the APA applies in this context, they uniformly have reached that conclusion by citing decisions applying the APA before Congress amended Section 925(c) to add a special judicial review provision. See, *e.g.*, *Bagdonas* v. *Department of Treasury*, 93 F.3d 422, 425 (CA7 1996) (citing *Bradley* v. *BATF*, 736 F.2d 1238, 1240 (CA8 1984)).

interpretation, not statutory mandate. But any tension between the ATF's appropriations statutes and a limitation on Section 925(c) that *the courts* have read into the statute cannot impliedly repeal the express statutory right to judicial review. Put another way, petitioners' argument under the APA not only fails to establish that this case presents the sort of manifest statement of congressional intent required for an implied repeal by appropriations law (*Will*, 449 U.S. at 220-21), but petitioners also fail to identify any conflict *at all* between the appropriations measures and the text of Section 925(c). In these circumstances, in order to reconcile the statutory texts (see *Morton* v. *Mancari*, 417 U.S. at 551), it is the application of the APA that either gives way or is modified. Thus, in *United States* v. *Fausto*, 484 U.S. 439 (1988), this Court held that the Civil Service Reform Act implicitly repealed government employees' right to file employment-related suits in the Claims Court, a right that the courts had previously inferred from the Back Pay Act. As the *Fausto* Court explained, although "it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change," the courts "frequently find" that Congress has repealed by implication "a legal disposition implied by a statutory text." *Id.* at 453.

Even assuming further that the APA applies with full force to Section 925(c) as petitioners assume, they nonetheless err in contending that the district courts are powerless to provide a remedy to a worthy applicant like respondent. Once again, petitioners' argument proceeds from the false premise that Congress has prohibited "the Secretary" from taking action on applications for firearms disabilities when in fact the appropriations statutes are expressly limited to ATF. See *supra* at 32-34. There is thus no obstacle to a district court "compel[ling]" the Secretary to grant relief or determining that the Secretary's failure to grant relief would be "arbitrary" or "unlawful[]." 5 U.S.C. 706.

Even if the Secretary of the Treasury were powerless to act as petitioners assert, district courts would have the authority under the APA to grant relief in appropriate cases without the necessity of a remand. That was the conclusion of the federal

courts even prior to Congress's enactment of a special judicial review provision. *Kitchens*, 535 F.2d at 1200. Petitioners' argument that a district court in the circumstances of this case may only compel agency action "unlawfully withheld or unreasonably delayed" (Pet. Br. 18-19 (citing 5 U.S.C. 706(1))) falsely assumes that the Secretary has "failed to act," when this case actually involves an affirmative "refusal to act." In these circumstances, the APA authorizes a district court to "hold unlawful and set aside agency action." 5 U.S.C. 706(2). See, *e.g.*, *First Am. Bank* v. *Resolution Trust Corp.*, 30 F.3d 644, 649 (CA5 1994); *Harrisburg Hosp.* v. *Shalala*, 48 F. Supp. 2d 467, 476 (M.D. Pa. 1999).[22] And the lawfulness of the Secretary's refusal to reinstate an applicant's right to keep and bear arms must, as in every instance of judicial review, be measured against the statutory standard for granting relief, not the rules governing the agency's funding. Contra Pet. Br. 19. The APA thus expressly provides for outright reversal of agency action that is "short of statutory right" or, depending on the scope of the district court's fact-finding, either "unsupported by substantial evidence" or "unwarranted by the facts." 5 U.S.C. 706(2)(C)-(F). In this case, not only does respondent have the "right" to have his firearms privileges restored under the standard set forth in Section 925(c), but the failure to do so is contrary to all the evidence in the case. The lower courts therefore acted properly in granting him relief.

In any event, the APA simply does not provide that a remand – relief that petitioners did not seek in the district court – is the exclusive remedy for an agency's "failure" or "refusal" to act. Petitioners notably fail to cite a single decision in the entire

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[22] Contrary to petitioners' claim (at 18) that the APA draws a distinction between agency "failure[s] to act" and "denials" by including both terms in the definition of "agency action" (5 U.S.C. 551(13)), the statutory definition simply conveys Congress's intent that essentially all final agency conduct – whether by way of action or inaction – is reviewable. Cf. *Evans* v. *United States*, 504 U.S. 255, 261, 268 (1992) ("bribery" and "extortion" are not mutually exclusive terms in the Hobbs Act).

history of the APA adopting such a categorical rule. If an agency were entitled to a "second bite at the apple" every time it made a poor decision, "administrative law would be a never ending loop from which aggrieved parties would never receive justice." *Nelson* v. *United States*, 64 F. Supp. 2d 1318, 1326 (N.D. Ga. 1999) (citation omitted). In cases like this one, the only entity that can provide the applicant the process to which he is due and that Congress has guaranteed is a court; there simply is no need for a remand because there is nothing left for the Secretary to do. A court may award relief denied by an agency rather than remand "if all essential factual issues have been resolved and the record adequately establishes a plaintiff's entitlement to benefits." KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 18.1, at 225 (3d ed. 1995 Supp.) (quoting *Faucher* v. *Secretary of Health & Human Servs.*, 17 F.3d 171, 176 (CA6 1994)). See also *Mowrey* v. *Heckler*, 771 F.2d 966, 973 (CA6 1985) (reversing agency decision when remand "unnecessary"). It would be particularly absurd for a federal court to refuse categorically to reverse unlawful agency action and to grant an individual relief to which he was entitled – precisely the result petitioners urge here – on the ground that the agency, for whatever reason, would not be able to grant relief on remand. The court could, should, and would grant appropriate relief itself.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.[23]

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[23] In the event the Court agrees with petitioners that the right to judicial review has been impliedly repealed, the case should be remanded to the Fifth Circuit for a determination whether respondent's Mexican conviction in fact subjects him to the disabilities of Section 922(g)(1). See BIO 9; Cert. Reply 1.

Respectfully submitted,

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APPENDIX

RELEVANT FEDERAL STATUTES

1. Section 921(a)(20) of Title 18, United States Code, provides:

The term "crime punishable by imprisonment for a term exceeding one year" does not include—

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

2. Section 925(c) of Title 18, United States Code, provides:

Exceptions: Relief from disabilities

(c) A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. Any person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court for the district in which he resides for a judi-

cial review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector conducting operations under this chapter [18 USCS §§ 921 *et seq.*], who makes application for relief from the disabilities incurred under this chapter [18 USCS §§ 921 *et seq.*], shall not be barred by such disability, from further operations under his license pending final action on an application for relief filed pursuant to this section. Whenever the Secretary grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor.

3. Act of Nov. 12, 2001, Pub. L. No. 107-67, 115 Stat. 514 provides, in pertinent part:

* * * none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c); Provided further, that such funds shall be available to investigate and act upon applications filed by corporations for relief from Federal firearms disabilities under 18 U.S.C. 925(c).

Identical language can be found at: Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, 114 Stat. 2763A-129; Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 113 Stat. 434; Treasury and General Government Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681-485; Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, 111 Stat. 1277; Treasury, Postal Service, and General Government Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-319; Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 471; Treasury, Postal Service, and General Government Appropriations Act, 1995, Pub. L. No. 103-329, 108 Stat. 2385; Treasury, Postal Service, and General Government Appropriations Act, 1994, Pub. L. No. 103-123, 107 Stat. 1228.

RELEVANT COMMITTEE REPORT EXCERPTS

1. H.R. Rep. No. 618, 102d Cong., 2d Sess. 13-14 (1992) states, in pertinent part:

Under current law, a person convicted of a crime punishable by imprisonment for a term exceeding one year may not lawfully possess, receive, ship, or transport firearms. In addition, other proscribed persons, *i.e.*, fugitives from justice, persons committed to mental institutions or adjudicated mentally incompetent, persons dishonorably discharged from the Armed Forces, citizens who have renounced citizenship, illegal aliens, and illegal drug users or addicts, are also under these disabilities.

The Bureau of Alcohol, Tobacco and Firearms (ATF) may grant relief from these disabilities where it is determined that the applicant for relief will not be likely to act in a manner dangerous to public safety and that the granting of relief would not be contrary to the public interest.

Under the relief procedure, ATF officials are required to guess whether a convicted felon or a person committed to a mental institution can be entrusted with a firearm. After ATF agents spend many hours investigating a particular applicant for relief, there is no way to know with any certainty whether the applicant is still a danger to public safety. Needless to say, it is a very difficult task. Thus, officials are now forced to make these decisions knowing that a mistake could have devastating consequences for innocent citizens.

Thus, the Committee believes that the $3.75 million and the 40 man-years annually spent investigating and acting upon these applications for relief would be better utilized by ATF in fighting violent crime. Therefore, the Committee has included language which states that no appropriated funds be used to investigate or act upon applications for relief from Federal firearms disabilities.

2. S. Rep. No. 353, 102d Cong., 2d Sess. 19-20 (1992) states, in pertinent part:

Under current law, a person convicted of a crime punishable by imprisonment for a term exceeding 1 year, may not lawfully posses, receive, ship, or transport firearms. ATF may grant relief from these disabilities where it is determined that the applicant for relief will not be likely to act in a manner dangerous to public safety and that the granting of relief would not be contrary to the public interest. Under the relief procedure, ATF officials are required to determine whether a convicted felon, including persons convicted of violent felonies or serious drug offenses, can be entrusted with a firearm. After ATF agents spend many hours investigating a particular applicant they must determine whether or not that applicant is still a danger to public safety. This is a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made. The Committee believes that the approximately 40 man-years spent annually to investigate and act upon these investigations and applications would be better utilized to crack down on violent crime. Therefore, the Committee has included language in the bill which prohibits the use of funds for ATF to investigate and act upon applications for relief from Federal firearms disabilities. Under current policy, States have authority to make these determination and the Committee believes this is properly where the responsibility ought to rest. The Committee expects ATF to redeploy the positions and funding presently supporting firearms disability relief to the Armed Career Criminal program.

3. H.R. Rep. No. 127, 103d Cong., 1st Sess. 90 (1993) states, in pertinent part:

The Committee has continued language which * * * prohibits the use of funds to investigate or act upon applications for relief from Federal firearms disabilities.

4. S. Rep. No. 106, 103d Cong., 1st Sess. 20 (1993) states, in pertinent part:

Under current law, a person convicted of a crime punishable by imprisonment for a term exceeding 1 year, may not lawfully possess, receive, ship, or transport firearms. ATF may grant relief from these disabilities where it is determined that the applicant for relief will not be likely to act in a manner dangerous to public safety and that the granting of relief would not be contrary to the public interest. Under the relief procedure, ATF officials are required to determine whether a convicted felon, including persons convicted of violent felonies or serious drug offenses, can be entrusted with a firearm. After ATF agents spend many hours investigating a particular applicant they must determine whether or not that applicant is still a danger to public safety. This is a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made. The Committee believes that the approximately 40 man-years spent annually to investigate and act upon these investigations and applications would be better utilized to crack down on violent crime. Therefore, the Committee has continued language in the bill which prohibits the use of funds for ATF to investigate and act upon applications for relief from Federal firearms disabilities. Under current policy, States have authority to make these determinations and the Committee believes that this is where the responsibility ought to rest. This provision shall not apply to applications filed by corporations.

5. H.R. Conf. Rep. No. 256, 103d Cong., 1st Sess. 25 (1993) states, in pertinent part:

Amendment No. 11: Inserts a provision proposed by the Senate which provides that the Bureau of Alcohol, Tobacco and Firearms may investigate and act upon applications filed by corporations (but not for individuals) for relief from Federal Firearms disabilities.

6. S. Rep. No. 286, 103d Cong., 2d Sess. (1994) contains no relevant statements.

7. H.R. Rep. No. 534, 103d Cong., 2d Sess. 92 (1994) states, in pertinent part:

The Committee has continued language which * * * prohibits the use of funds to investigate or act upon application for relief from Federal firearms disabilities.

8. H.R. Rep. No. 183, 104th Cong., 1st Sess. 15 (1995) states, in pertinent part:

For the fourth consecutive year, the Committee has added bill language prohibiting the use of Federal funds to process applications for relief from Federal firearms disabilities. The Committee understands the controversial nature of the underlying law allowing convicted felons to have their right to own a firearm restored. However, those who commit serious crimes forfeit many rights and those who commit felonies should not be allowed to have their right to own a firearm restored. We have learned sadly that too many of these felons whose gun ownership rights were restored went on to commit violent crimes with firearms. There is no reason to spend the Governments' time or taxpayer's money to restore a convicted felon's right to own a firearm.

9. S. Rep. No. 121, 104th Cong., 1st Sess. (1995) contains no relevant statements.

10. H.R. Rep. No. 660, 104th Cong., 2d Sess. 26 (1996) states, in pertinent part,

The Committee has modified a continuing provision prohibiting the Bureau of Alcohol, Tobacco and Firearms from acting upon applications for relief from Federal firearms disabilities. The modification holds that refusal to act upon such applications shall not be subject to judicial review for any felon convicted of

a violent crime, firearms violation, or drug related crime. [Note, the amendment to which this statement refers was not adopted.]

11. S. Rep. No. 330, 104th Cong., 2d Sess. (1996) contains no relevant statements.

12. H.R. Rep. No. 240, 105th Cong., 1st Sess. 95 (1997) contains no relevant statements.

13. H.R. Rep. No. 592, 105th Cong., 2d Sess. (1998) states, in pertinent part:

The Committee has continued language * * * prohibiting the use of funds to investigate or act upon applications for relief from Federal firearms disabilities.

14. H.R. Rep. No. 231, 106th Cong., 1st Sess. 80 (1999) states, in pertinent part:

The Committee has continued language which * * * prohibits the use of funds to investigate or act upon applications for relief from Federal firearms disabilities.

15. H.R. Rep. No. 756, 106th Cong., 2d Sess. 103 (2000) states, in pertinent part:

The Committee has continued language * * * prohibiting the use of funds to investigate or act upon applications for relief from Federal firearms disabilities.

16. H.R. Rep. No. 152, 107th Cong., 1st Sess. 97 (2001) states, in pertinent part:

The Committee has continued language which * * * prohibits the use of funds to investigate or act upon applications for relief from Federal firearms disabilities.

FAILED ATTEMPTS TO REPEAL OR AMEND 18 U.S.C. 925(c)

Stop Arming Felons Act, S. 2304, 102d Cong., 2d Sess. § 3 (1992), and *Stop Arming Felons Act*, S. 1400, 103d Cong., 1st Sess. § 3 (1993) provide:

(a) IN GENERAL—Section 925(c) of title 18, United States Code, is amended—

(1) in the first sentence, by inserting '(other than a natural person)' before 'who is prohibited';

(2) by striking the second and third sentences;

(3) in the fourth sentence—

(A) by inserting 'person (other than a natural person) who is a' before 'licensed importer'; and

(B) by striking 'his' and inserting 'the person's'; and

(4) in the fifth sentence, by inserting '(i) the name of the person, (ii) the disability with respect to which the relief is granted, and, if the disability was imposed by reason of a criminal conviction of the person, the crime for which and the court in which the person was convicted, and (iii)' before 'the reasons therefor'.

(b) APPLICABILITY—The amendments made by subsection (a) shall apply to—

(1) applications for administrative relief and actions for judicial review that are pending on the date of enactment of this Act; and

(2) applications for administrative relief filed and actions for judicial review brought after the date of enactment of this Act.

Stop Arming Felons Act, S. 1068, 104th Cong., 1st Sess. §§ 2-3 (1995), *Stop Arming Felons Act*, H.R. 2101, 104th Cong., 1st Sess. §§ 2-3 (1995), *Stop Arming Felons Act*, H.R. 1228, 105th Cong., 1st Sess. §§ 2-3 (1997), *Stop Arming Felons Act*, H.R. 2281, 106th Cong., 1st Sess. §§ 2-3 (1999), and *ENFORCE Act*, H.R. 4066, 106th Cong., 2d Sess. §§ 301-302 (2000) provide:

ADMINISTRATIVE RELIEF FROM CERTAIN FIREARMS AND EXPLOSIVES PROHIBITIONS.

(a) IN GENERAL—

(1) Section 925(c) of title 18, United States Code, is amended—

(A) in the first sentence by inserting '(other than a natural person)' before 'who is prohibited';

(B) in the fourth sentence—

(i) by inserting 'person (other than a natural person) who is a' before 'licensed importer'; and

(ii) by striking 'his' and inserting 'the person's'; and

(C) in the fifth sentence, by inserting '(i) the name of the person, (ii) the disability with respect to which the relief is granted, (iii) if the disability was imposed by reason of a criminal conviction of the person, the crime for which and the court in which the person was convicted, and (iv)' before 'the reasons therefor'.

(2) Section 845(b) of title 18, United States Code, is amended—

(A) in the first sentence, by inserting '(other than a natural person)' before 'may make application to the Secretary'; and

(B) in the second sentence, by inserting '(other than a natural person)' before 'who makes application for relief'.

(b) APPLICABILITY—The amendments made by subsection (a) shall apply to—

(1) applications for administrative relief and actions for judicial review that are pending on the date of enactment of this Act; and

(2) applications for administrative relief filed, and actions for judicial review brought, after the date of enactment of this Act.

PERMANENT FIREARM PROHIBITION FOR CONVICTED VIOLENT FELONS AND SERIOUS DRUG OFFENDERS.

Section 921(a)(2) of title 18, United States Code, is amended—

(1) in the first sentence—

(A) by inserting '(A)' after '(20)'; and

(B) by redesignating subparagraphs (A) and (B) as clauses (i) and (ii), respectively;

(2) in the second sentence, by striking 'What' and inserting the following:

'(B) What'; and

(3) by striking the third sentence and inserting the following new subparagraph:

'(C) A conviction shall not be considered to be a conviction for purposes of this chapter if—

'(i) the conviction is reversed or set aside based on a determination that the conviction is invalid;

'(ii) the person has been pardoned, unless the authority that grants the pardon expressly states that the person may not ship, transport, possess, or receive firearms; or

'(iii) the person has had civil rights restored, or the conviction is expunged, and—

'(I) the authority that grants the restoration of civil rights or expungement expressly authorizes the person to ship, transport, receive, and possess firearms

and expressly determines that the circumstances regarding the conviction and the person's record and reputation are such that the person is not likely to act in a manner that is dangerous to public safety, and that the granting of the relief is not contrary to the public interest; and

'(II) the conviction was for an offense other than a serious drug offense (as defined in section 924(e)(2)(A)) or violent felony (as defined in section 924(e)(2)(B)).'.

[Note: the text of H.R. 4066 varies slightly from the others. Subsection (3)(C)(iii) of the section entitled "PERMANENT FIREARM PROHIBITION FOR CONVICTED VIOLENT FELONS AND SERIOUS DRUG OFFENDERS" of that bill reads:

'(C) A State conviction shall not be considered to be a conviction for purposes of this chapter if the person has been pardoned, has had restored any civil rights taken away by virtue of the conviction, or the conviction is expunged, and—

'(i) the authority that grants the pardon, the restoration of civil rights, or the expungement expressly authorizes the person to ship, transport, receive, and possess firearms and expressly determines that the circumstances regarding the conviction and the person's record and reputation are such that the person is not likely to act in a manner that is dangerous to public safety, and that the granting of the relief is not contrary to the public interest; and

'(ii) the conviction was for an offense other than a serious drug offense (as defined in section 924(e)(2)(A)) or violent felony (as defined in section 924(e)(2)(B)).'].

ENFORCE Act, S. 2338, 106th Cong., 2d Sess. § 301 (2000) provides:

(a) IN GENERAL –

(1) FIREARMS—Section 925(c) of title 18, United States Code, is amended—

(A) by inserting '(1)' after '(c)';

(B) in the first sentence, by inserting '(other than a natural person)' before 'who is prohibited';

(C) in the fourth sentence—

(i) by inserting 'person (other than a natural person) who is a' before 'licensed importer'; and

(ii) by striking 'his license' and inserting 'the license of that person'; and

(D) by striking the last sentence and inserting the following:

'(2) Whenever the Secretary grants relief under this section to any person, the Secretary shall promptly publish notice of such action in the Federal Register, which shall include—

(A) the name of the person;

(B) the disability with respect to which the relief is granted;

(C) if the disability was imposed by reason of a criminal conviction of the person, the crime for which and the court in which the person was convicted; and

(D) the reasons for the decision of the Secretary.'

(2) EXPLOSIVE MATERIALS—Section 845(b) of title 18, United States Code, is amended—

(A) in the first sentence, by inserting '(other than a natural person)' before 'may make application to the Secretary'; and

(B) in the second sentence, by inserting '(other than a natural person)' before 'who makes application for relief'.

(b) APPLICABILITY—The amendments made by subsection (a) shall apply to any application for administrative relief and any action for judicial review that—

(1) is pending on the date of enactment of this Act; and

(2) is brought or filed on or after that date.

PERMANENT FIREARM PROHIBITION FOR CONVICTED VIOLENT FELONS AND SERIOUS DRUG OFFENDERS

Section 921(a)(2) of title 18, United States Code, is amended—

(1) in the first sentence—

(A) by redesignating subparagraphs (A) and (B) as clauses (i) and (ii), respectively; and

(B) by inserting '(A)' after '(20)';

(2) in the second sentence, by striking 'What' and inserting the following:

'(B) What'; and

(3) by striking the third sentence and inserting the following new subparagraph:

'(C) A conviction shall not be considered to be a conviction for purposes of this chapter if—

'(i) the conviction is for an offense other than a serious drug offense (as defined in section 924(e)(2)(A)) or violent felony (as defined in section 924(e)(2)(B));

'(ii) the person is pardoned or has restored any civil right taken away by virtue of the conviction, or the conviction is expunged, and

'(iii) the authority that grants the pardon, the restoration of civil rights, or the expungement—

'(I) expressly authorizes the person to ship, transport, receive, and possess firearms; and

'(II) expressly determines that the circumstances regarding the conviction and the person's record and reputation are such that the person is not likely to act in a manner that is dangerous to public safety, and that the granting of the relief is not contrary to the public interest.'.

STATE RESTORATION STATUTES

States generally restoring firearms rights automatically:

Alaska (ALASKA STAT. § 15.05.030 (Michie 2001))

Colorado (Colo. Const. Art. VII, § 10)

Delaware (Del. Code Ann. Tit. 11, § 4347(i) (2001))

Florida (Fla. Stat. Ann. § 940.05 (West 2001))

Hawaii (Haw. Rev. Stat. § 831-5 (2001))

Kansas (Kan. Stat. Ann. § 22-3722 (2001))

Louisiana (La. Const. Art. I, § 20)

Minnesota (Minn. Stat. Ann. § 609.165 (West 2001))

Montana (Mont. Code Ann. § 46-18-801(3) (2001))

Nebraska (Neb. Rev. Stat. § 29-112.01 (2001))

New Hampshire (N.H. Rev. Stat. Ann. § 607-A:5 (2002))

Oregon (Or. Rev. Stat. § 137.281(5) (2001))

South Dakota (S.D. Codified Laws § 23A-27-35 (Michie 2001))

Tennessee (Tenn. Code Ann. § 40-29-101 (2001))

States generally providing for judicial restoration of firearms rights:

Arizona (Ariz. Rev. Stat. Ann. § 13-905, -909, -910 (West 1989))

Mississippi (Miss.Code Ann. § 97-37-5 (2001))

New York (N.Y. Correct. Law § 702(1) & (2) (McKinney 1987))

Ohio (Ohio Rev. Code Ann. § 2923.14 (Anderson 2002))

Washington (Wash. Rev. Code Ann. § 9.92.066 (West 1988)

TREASURY DEPARTMENT ORDER ESTABLISHING BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

Internal Revenue Service (I.R.S.)

Treasury Department Order

ESTABLISHMENT OF THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

June 6, 1972

By virtue of the authority vested in me as Secretary of the Treasury, including the authority in Reorganization Plan No. 26 of 1950, it is ordered that:

1. The purpose of this Order is to transfer, as specified herein, the functions, powers and duties of the Internal Revenue Service arising under laws relating to alcohol, tobacco, firearms, and explosives (including the Alcohol, Tobacco and Firearms Division of the Internal Revenue Service) to the Bureau of Alcohol, Tobacco and Firearms (hereinafter referred to as the Bureau) which is hereby established. The Bureau shall be headed by the Director, Bureau of Alcohol, Tobacco and Firearms (hereinafter referred to as the Director). The Director shall perform his duties under the general direction of the Secretary of the Treasury (hereinafter referred to as the Secretary) and under the supervision of the Assistant Secretary (Enforcement, Tariff and Trade Affairs, and Operations) (hereinafter referred to as the Assistant Secretary).

2. The Director shall perform the functions, exercise the powers, and carry out the duties of the Secretary in the administration and enforcement of the following provisions of law:

* * * * *

(d) 18 U.S.C. Chapter 44 (relating to firearms);

* * * * *